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MODERN CONSTITUTIONS  
SINCE 1787





# MODERN CONSTITUTIONS SINCE 1787

BY

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## P R E F A C E

THIS work seeks to follow an organic plan in discussing and describing those forms of government which have arisen, and those pre-existing forms which have undergone significant change, during the last hundred and fifty years. It is neither a comparative study of separate institutions arbitrarily isolated from the body politic, nor a piecemeal study of constitutions country by country in watertight compartments. Thus, there will be found no separate treatment of "Second Chambers" or "The Executive" or "Direct Democracy"; nor, on the other hand, will everything that has to be said about the constitution of the United States of America, or of France, or of Italy, be found concentrated in one place. The aim has been to produce neither a treatise on comparative government nor a political gazetteer, but a work which places political constitutions and institutions both in their historical perspective and in their relationship one to another. Constitutions are grouped and the main constitutional trends are presented in a way which seeks to be logical without becoming arbitrary. While a chronological scheme is generally followed, it is frequently departed from in order to give pattern and coherence to the theme.

The book is designed principally for students of modern history and contemporary politics who wish to give added precision to their knowledge of governmental forms and to understand better how and why the various constitutions came into being, underwent modification, or were abandoned in favour of other forms. Both the legacy of earlier constitutions and the antecedents of contemporary ones are discussed. Certain seminal constitutions, such as the French of 1793, the Spanish of 1812 and the

German of 1849, though they never effectively went into operation, are given detailed notice alongside the veteran and successful constitutions of the United States of America, of Sweden, of Norway and of Belgium, all now well into their second century of continuous validity, and recent constitutional creations, the qualities of transience or permanence of which have, in most cases, yet to be proved.

An encyclopaedia or concordance of every known constitution of the last century and a half has not been attempted, nor will every contemporary constitution be found to have received attention. Apart from his own necessarily personal selection of constitutions for what he believes to be their significance as against others which he has left out of consideration, the writer has decided to exclude, quite apart from their interest or merits (which may be considerable) the constitutions of tiny republics or principalities such as Danzig, Monaco, Andorra, Cracow or San Marino, the individual constitutions (with a few exceptions) of the dependencies of the colonial powers and of the member-states of federations, and all forms of international constitutional machinery. After considerable hesitation he decided to include in the general scheme chapters on the government and constitutional development of Great Britain, though conscious of the special difficulties involved in attempting this within so small a compass. He is conscious, too, of having been somewhat cavalier in his treatment of the constitutions of Latin America and of the countries of the Balkans, but in extenuation he may claim that the very people for whom these constitutions were designed have themselves provided him with a precedent by not paying overmuch attention to them.

An attempt has been made in the bibliography at the end of the book to give reference to at least one reasonably accessible and reliable text of every constitution dealt with, and to translations into English, French or

German of constitutions the originals of which are not in one of these languages. The general bibliography lists the leading collections of constitutional texts, but separately published versions of individual constitutions which are not available or complete in any of these collections are referred to in the chapter bibliographies. Footnote references are not given, but as far as possible all passages appearing within quotation marks in the book are identified and acknowledged in the appropriate chapter bibliographies.

No mention is being made of the names of the many people whose advice was sought and so generously given during the preparation of this work, as the writer wishes to retain full responsibility for the degree of accuracy of the information and soundness of the judgments set down, but he would like here to thank them all. He is also very greatly indebted to his students both in London and in Birmingham for acting collectively and perhaps unconsciously, from time to time, as the dog upon which certain morsels of his material have been tried, to his wife for having unflaggingly responded at every stage of the work to his demands for opinion and criticism, and to Dr. R. A. Humphreys for having most productively read through the final proofs.

A book such as this, covering such a wide field that no one person could hope to be the master of more than a few small corners of it, cannot hope to escape inaccuracies or faulty judgments, but it is hoped that these have been reduced to a minimum. The writer makes no claim to have distilled out of the work every trace of personal viewpoint, but, outside the introductory chapter, he has sought to avoid broad generalizations, and even there he wishes them to be regarded as suggestions rather than as dogma. He cannot, there or anywhere else, expect every reader to agree with the judgments he expresses. Indeed, they would be less than judgments if everybody did.

The prefatory remarks to each of the nine parts into which the book is divided are not intended as summaries or paraphrases of these parts, but seek to present a broader perspective than is possible in the detailed chapter by chapter exposition. They also aim to explain the grouping of constitutions adopted, and to define and justify the use of certain descriptive words and terms which the writer has used for labels where he found nothing to satisfy him in what he knew of the accepted nomenclature of political science.

J. A. H.

KEMERTON

TEWKESBURY

GLOUCESTERSHIRE

*January 1, 1939.*

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## CHAPTER I

### INTRODUCTORY

It is a striking commentary upon the political genius of the Greeks that, while all other great civilizations prior to modern times have almost invariably relied for their government on some form or other of autocracy, enough variation existed among the governments of Ancient Greece for Aristotle, after a study of one hundred and fifty-eight different constitutions, to draw up his famous six-fold classification of three good forms and three bad. It is a tribute both to this genius and to the peculiar genius of Aristotle himself as a political scientist, that his classification remained entirely adequate at least up to the middle of the eighteenth century, and that it continues to have considerable validity even today.

ARISTOTLE'S  
CLASSIFICA-  
TION OF CON-  
STITUTIONS

It is true that Machiavelli, that incomparable observer of reality, gave a twist to Aristotle's definition by insisting that sometimes, in order to be good, a government must also be bad, but his idea of the good was scarcely Platonic and his understanding of evil was acquired from sources not accessible to Aristotle. Only during the last hundred and fifty years has the classification of states and forms of government needed to be thrown back into the melting-pot, along with most of the states and governments of the world themselves, yet even from this melting-pot the solid core of Aristotle's conclusions emerged undefiled. His classification has to be elaborated to cover all the permutations and combinations of government today, but it does not have to be set aside.

By the middle of the eighteenth century the prestige of that New Monarchy whose dazzling activities had per-

suaded peoples to give up their birthright of mediaeval universalism for a mass of pageantry, was wearing extremely thin. Even before the end of the sixteenth century, cracks had appeared. The British Interregnum, following a half century after the rise of the United Netherlands, created a gaping hole which no Restoration at home nor *grand monarchie* abroad could invisibly mend. The eighteenth century began with the *ancien régime* (that this New Monarchy had by then become) already on the defensive, and, in places at least, pathetically willing to make concessions in the sphere of government that would restore its popularity while saving its face. Two alternatives in constitutional development were in the air. Liberalizing an oligarchy was the process advocated in Britain, whereas enlightening a despotism was the continental tendency. Following the impact of Montesquieu (whose *Esprit des Lois* appeared in 1748) it began to be realized that one land's meat might well be another land's poison, and that while certain individual constitutions might seem particularly admirable, no one type of ideal state could suit all conditions of people and all environments. This theory of relativity in government, which added considerations of space and time to those of quality and quantity, was the first major advance in the method of studying and assessing constitutions since Aristotle.

THE ANCIEN  
RÉGIME AND  
MONTESQUIEU

Concurrent with this new method of regarding constitutions came a new method of devising them. First appearing fitfully in the seventeenth century, but becoming epidemic toward the end of the eighteenth, the written constitution emerged. Before this time part of the fundamental constitutional system of a country or state might have secured documentary crystallization, but a great deal more would not. A country's constitutional history, stretching back for many centuries, would be punctuated with documents of constitutional significance, but no one

THE WRITTEN  
CONSTITUTION

of them would in itself be a constitution, and the extent to which any of them had fundamental validity varied considerably. At one extreme they were scraps of parchment dependent from day to day upon a king's pleasure ; at the other they could be everlasting compacts between the citizens of free communities, and accepted as such by their posterity. Between the two came a welter of charters, statutes, bulls, treaty clauses, political testaments, pragmatic sanctions, manifestoes and mere undertakings, that had managed to stick like burrs to the body politic on its way down the ages. From the amorphous heterogeneity of some of these venerable ragbags it was almost a relief to have the situation simplified by the seventeenth-century despot who could point to himself and pronounce " *L'état, c'est Moi* ", but it was a much more satisfying remedy to be able to point to one not-too-bulky document and to exclaim " *L'état, c'est là* ". The vogue of the written constitution may have brought all sorts of troubles in its train, but it also brought clarity and precision to forms of government to an extent not previously attained.

A fresh method of approach toward the meaning of political institutions and a new technique for defining and codifying them, greatly facilitated the sweeping changes in governmental forms that occurred in so many countries from the last quarter of the eighteenth century onward. After centuries of virtual stagnation, country after country revised, refurbished or rejected its traditional constitution. The thirty years from 1776 to 1806 saw important changes in the government of the British colonies in North

SWEEPING  
CONSTITU-  
TIONAL  
CHANGES,  
1776-1806

America (both in the thirteen colonies which in this period became independent, and in Canada), of British India (where the special position of the great East India Company was investigated and re-defined), of Sweden, of France (as well as all those neighbouring countries that fell into the sphere of influence of the French republic

and of the empire that succeeded it in 1804) and of Ireland (who both regained and once more lost her legislative independence during this period). The Hapsburg dominions remained impervious to change, despite the *aufgeklärte* stimulus of Joseph II; England resisted all attempts to jerk the clock either back or forward in the governmental field, and time ticked away with its traditional phlegm despite both George III and Tom Paine; Spain and Prussia continued to rest upon faded political laurels, though on the eve of great changes; Russia passed from Catherine through Paul to Alexander still convinced that governmental reorganization, though good for other countries, was not an article for import; the Balkans still slumbered under the unregenerate domination of the Sublime Porte. By contrast with these changes and counter-changes, two archaic survivals of names that had once meant much both in politics and in government, disappeared from the stage during this period. In 1798 the Venetian Republic, whose oligarchy, in its latter days at least, deserved few of the tears that were shed at its passing, and in 1806 the Holy Roman Empire, at whose passing no tears at all were shed, were swept into discard before the hand of constitutional revision could touch them, but the crowned republic (or elected monarchy) of Poland produced, in the throes of partition, a new model written constitution as her penultimate gesture.

The conditions which opened the floodgates of constitutional change during the last quarter of the eighteenth century, and which have continued to open and close them at irregular intervals during the last hundred and fifty years, varied widely from generation to generation and are not safe subjects for generalization. Nor

|                       |   |
|-----------------------|---|
| AGENCIES<br>OF CHANGE | are those which have produced the more continuous but less impressive trickle of piecemeal amendment and gradual replacement in those countries which succeeded in avoiding complete remodel- |
|-----------------------|---|

ling. Motivating forces have been many, but perhaps two that may be singled out, not only for their significance, but also because it is easy to overlook them when problems are approached from the institutional angle, are economic pressure and considerations of foreign policy, often acting together or upon each other. The impact of Locke and the contractualists, of Rousseau and the idea of the general will, of Bentham and the principle of utility, of Hegel and Owen and Marx, must not be forgotten and is not likely to be, but it must also be remembered that constitutional upheaval in France at the end of the eighteenth century followed political alliance with rebels against royal tyranny and oligarchic privilege, in which cause France's financial exhaustion was completed and the resistance of her rulers to radical demands for changes decisively lowered, and that the even more complete upheaval in Russia early in the twentieth century followed the conclusion of a political *entente* with two great democracies and the complete economic prostration caused by two years of devastating but indecisive warfare as a member of this *entente*. An autocracy or an oligarchy that chooses political alliance with a country or countries possessing democratic forms or tendencies in government, appears to stand in great danger of constitutional upheaval, for the alliance is a tacit admission that democracies can be strong and are diplomatically acceptable as equals. Of course, where a small liberal or democratic state has to accept political alliance with a great power of autocratic governmental tendencies (or refuses such an alliance when proffered) its own free institutions stand in danger, but this type of situation rarely arises, and when allies are approximately equal in power and prestige the prevailing drift is toward and not away from liberty and democratization. Successful war, too, tends to carry elements of the political institutions of the victor states even into the unannexed and unoccupied territories of the losers,

FOREIGN  
POLICY AND  
ECONOMIC  
PRESSURE



and into suitably impressed neutral countries as well. The classic example of this is, of course, the spread of the constitutional ideas and devices of revolutionary France, but the influence of the political institutions of the victorious democracies of the war of 1914-18 upon constitutional changes throughout the world (but particularly in the defeated countries and among the peoples liberated by their break-up) was equally striking. The contemporary phenomena of the spread without the aid of alliance or war of authoritarian institutions of fascist tendencies, and of the failure of soviet tendencies to spread except most spasmodically, are less easily explained along such lines. Earlier cases of the effect of the spontaneous emulation of a country's form of government by impressionable though remote peoples, in the hope of matching its achievements, are many, from the copying of salient features of the United States constitution throughout Latin America to the adoption by Japan in 1889 of a western constitution closely modelled upon that of Prussia, following the dazzling successes of that country in the sixties and seventies in both the national and the international sphere, while the black-balling of a constitutional system such as Soviet Russia's has suffered, finds parallel in the universal aloofness that was exhibited for half a century toward the example of the French Jacobin constitution of 1793.

An interesting recent change has been the formal democratization of the constitution of the Union of Soviet Socialist Republics, closely following a diplomatic alliance with democratic France, while Czechoslovakia remained

CONSTITU-      a democracy in the face of the heaviest  
TIONAL      pressure and amid a sea of authoritarian and  
TACKING      semi-authoritarian states partly under the  
stimulus of her alliance with France and of the goodwill that she believed Britain extended toward her principally because she was a democratic state. Most striking of all is the constitutional tacking that has been indulged in by the Polish ship of state since Poland again became an

independent nation. Reborn into a world about to be made safe for democracy under the fourteen-pointed star, she carried the Wilsonian birthmark in the shape of her "little constitution" of 1919, and even the rugged Pilsudski consented to beat the sword of his dictatorship into a share in the government of a neatly balanced democratic state; by 1921, when she adopted a full-length constitution, she was already within the French political orbit (she had concluded an alliance with France and a French military mission had lent unction to "the miracle of the Vistula") and this constitution was in spirit, and in many places to the letter, a faithful copy of that of the Third French Republic; then came an intensification of her anti-Russian phobia and a *rapprochement* with Germany, leading to a movement for "strong government" that brought Pilsudski again into the limelight with the *coup d'état* of 1926, and the constitution was amended to increase the powers of the executive and decrease those of the legislature; next followed Italian economic and ideological penetration in Poland, and a "Non-Partizan Bloc for co-operation with the Government" appeared as an alternative to unrestricted party strife, while after 1930 the no-party state (a variation on Italy's one-party state) was advocated as the only solution to Poland's difficulties; the pressure of a new *régime* in Germany had not been felt for long before Poland's constitution of 1935 was published, with its semi-dictatorial head of the state and its emasculated legislature; a new isolationism imposed by the necessities of the international situation has since then kept Poland aiming at a middle constitutional way between fascism and democracy, without any decisive trend in either direction, but such is the sensitiveness of her political institutions to the exigencies of foreign policy, that it may well be events outside rather than inside Poland which will tip the balance, unless she succeeds in prolonging indefinitely her tight-rope walk, as did the old Poland for so long between monarchy

and republicanism, and even between law and anarchy.

Countries of great and varied natural resources and relatively remote geographically from other great powers,

tend to be least susceptible to considerations of foreign policy and of economic urgency in their constitutional development. The best example of such a country in the contemporary world is of course the United States of America,

but the Union of Soviet Socialist Republics is potentially in a similar position and the British Dominions of Australia and New Zealand possess at least features of the same impermeability. It is entirely absent from the crowded states of Europe and of South America, nor can any part of Africa, or of Asia apart from the Soviet Union, be said, after recent events, to possess any degree of immunity from such gusts from without. Only a very complete self-sufficiency (which, under the name of autarchy, certain countries of considerable economic and strategic vulnerability have recently been attempting to achieve) or a very complete self-satisfaction (which one or two peoples seem to possess by nature and which certain other peoples have latterly had instilled into them by every art known to the publicist and the propagandist) would seem to provide the hope of such immunity to the great majority of the countries of the world today. Indeed, whatever may happen in books, in the great world politics and economics cannot be kept out of government, nor should they be. Forms of government distilled from unadulterated political theories have either to be laid up in heaven or find themselves laid out on earth. Countries which scorn to borrow political ideas and devices that have

SUSCEPTI-  
BILITY TO  
OUTSIDE  
INFLUENCES

CONSTITU-  
TIONS :  
DERIVATIVE  
AND  
INDIGENOUS

already been tried elsewhere, stand in danger of institutional atrophy, just as those which adopt them slavishly tend to suffer from institutional indigestion. The free exchange of information concerning governmental forms and experiments that the modern world provides through the

printing press and its new and formidable visual and vocal allies, makes impossible the development in isolation of any governmental system, such as was general in the ancient world, not unusual in mediaeval times and not unknown in the early modern era. It is no good declaring that your institutional ideology is not a commodity for export, or that other peoples' may not be imported. These things have a habit of getting around. Whether this tendency toward derivation (which, from various motives, has been a characteristic of modern constitutions ever since the American colonists drew arresting and unorthodox conclusions from British institutions as they saw them and re-exported these conclusions all over the world) has produced more satisfactory and appropriate forms of government than those developed from their own resources by, for instance, the Chinese, the Japanese, the Aztecs and the English before the sixteenth century A.D., must remain a matter for argument and for the examination of individual cases. It is not in itself a criticism of Germany's Third *Reich* that it owes nothing to the Holy Roman Empire but much to Signor Mussolini's, or of the "Third Greek Civilization" of General Metaxas that it is a far and unheeded cry from the Athens of Pericles. If the governing principles of fascism jump the Alps and eventually seep through to the Piraeus, they are not damned by that fact in itself. The Third Greek Civilization, or any other, can hold up its head if it is third-hand but not if it is third-rate, which brings the wheel full circle back to Aristotle, who may be said to have uttered the last as well as the first word on the subject: "The best government must necessarily be that which is administered by the best men". When for purposes of study and classification institutions are isolated and analysed, and dealt with apart from their human administrators, this sobering fact has always to be remembered, that they have neither a beginning nor an end in themselves.

BACK TO  
ARISTOTLE



## PART I

# REVOLUTIONARY CONSTITUTIONS — THE SPONTANEOUS STATE

## *Revolutionary Constitutions — The Spontaneous State*

*It is more than significant that the first comprehensive written constitutions of the modern world were all followed immediately by, or followed immediately after the rejection of monarchical institutions. They were all the children of revolution, and the new state organizations erected by the successful revolutionaries were all spontaneously republican in form. A few years before 1649 a republic was undreamed of in England, as it was as late as 1791 in France and 1774 in America. Yet the Agreement of the People, the first attempt at a written constitution in the modern sense (the Instrument of Government a few years later, was a much more elaborate attempt) is republican in form, as are the eleven state constitutions drawn up in the revolted American colonies of Great Britain after the Declaration of Independence (Rhode Island and Connecticut made do with amending their colonial charters), and as are the French constitutions of 1793 and 1795, though the first French revolutionary constitution (that of 1791) contented itself with putting monarchy in chains.*

*This first general constitutional era of the modern world, the last quarter of the eighteenth century (for previously constitutional endeavour and achievement had been sporadic and isolated), may thus be characterized as one of the spontaneous growth of republican institutions — republics one and indivisible as in the unified British Isles of the Instrument of Government and in the France of the Year III ; republics various and (eventually) federated, as in the United States of the Articles of Confederation and the Federal Constitution.*

*Their republicanism (with one or two striking exceptions) if not their spontaneity, were reflected in other constitutions devised in Europe and America during or just after this era.*

## CHAPTER II

### THE UNITED STATES OF AMERICA AND THE FEDERAL CONSTITUTION

HAD the Federal constitution of the United States emerged still-born from the labours of the Philadelphia Convention of 1787; had the eloquence of Hamilton, Madison and Jay in *The Federalist* fallen upon less sympathetic ears; had Mr. C. A. Beard's "determined minority" been less pertinacious, less skilful, or less lucky, and ratification been refused by the separate states, this constitution would, nevertheless, deserve the careful attention of students of government as the first written and comprehensive constitution of modern times devised to operate in a national sphere, framed by a nationally representative constitutional convention, defining the structure of a popular as well as of a federal government, and capable of operating throughout a large and (by the standards of those days) reasonably well populated territory. It would occupy a place in history and in the commentaries alongside the Instrument of Government and the Frankfurt constitution of 1849. Though equally unsuccessful for immediate purposes it might ultimately have proved equally seminal.

But as a constitution which was adopted and almost immediately put into operation, and which has remained in operation virtually unchanged as to text not only throughout the territory for which it was designed (with one short break), but extended to a territory many times greater in size and population, for a hundred and fifty years, it acquires a significance almost unrivalled among constitutional

INTRINSIC  
VALUE OF  
UNITED STATES  
CONSTITUTION

ITS  
UNRIVALLED  
SIGNIFICANCE



documents. Whether such longevity be regarded as a virtue or as a vice in a constitution, it at least invests the American constitution with the glamour of being one of the first (perhaps also one of the last) wonders of our present civilization. While France, the prodigal, ran through twelve distinct fundamental constitutions before finding unexpected durability in the three-piece reach-me-down of 1875, the United States of America continued to cut an ever-increasing figure in the world in the constitutional garb of 1787, patched here and there, shiny in places, but holding together remarkably well for an eighteenth-century creation amid the styles and stresses of the twentieth century.

This first of modern national constitutions to set out comprehensively the structure of government in one document did not spring fully framed from the American Revolution like Athene from the brow of Zeus. Just as the Stamp Act is no adequate starting-point for the revolution itself, the constitution was evolved from the experience of the Anglo-Saxon people in two hemispheres and through several centuries, an experience enriched from time to time by wider contacts and by profound commentaries from within and from without.

The very need for an effective national government operating throughout all the thirteen "United" States was by no means universally felt, and the splendid initial enthusiasm that found voice in the Declaration of Independence rapidly deteriorated into the cautious particularism that brought forth the mouse of the Articles of Confederation a year later, and the even more grudging spirit that delayed their coming into operation for another four years. When at last, in 1781, Maryland ratified the Articles and they became effective, surviving enthusiasts might cry, "This day we are become a Nation", but this was very far from being true.

EVOLVED  
FROM  
EXPERIENCE

THE  
ARTICLES OF  
CONFEDERA-  
TION

The Articles sought to replace the authority of Great Britain by some general form of government for the thirteen states that would offend none of them. They set up what was admittedly not a national government, but only a league of friendship, and declared (article two), "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not, by this Confederation, expressly delegated to the United States in Congress assembled". The powers delegated were so meagre that Washington promptly pointed out: "Without a controlling power in Congress it will be impossible to carry on the war", while Alexander Hamilton urged, "We ought, without delay, to enlarge the powers of Congress". The states, large and small, were equally represented in Congress, but there was no effective executive organization, no president, no national courts and no military or financial power. Congress could only recommend legislation to the states, and could only requisition monies and armed forces. The states were quite at liberty to ignore its recommendations and disregard its requisitions.

This weakness was made more and more evident every day in the period of depression that followed the peace of 1783. Congress proved entirely inadequate to deal with the many post-war problems that assumed national proportions. "What a triumph for the advocates of Despotism to find that we are incapable of governing ourselves", cried Washington, and he described the Confederation in 1784 as "A half-starved, limping government, always upon crutches, and tottering at every step".

Such a state of chaos could not but arouse a growing agitation for more effective government. Concerning the nature of such a government there were differences, but there was at least a consensus of opinion in favour of a government that would be able to force Britain and Spain to fulfil their treaty obligations, and to fix with authority the

MORE  
EFFECTIVE  
GOVERNMENT  
DEMANDED

disputed state boundaries, while beyond this general desire there was that of the various interests in the states to which the Articles were directly adverse, and it was these interests that drove matters to a head. A trade convention between Virginia and Maryland had met at Alexandria in 1785, and out of this grew the Annapolis Convention of 1786, to which all the states were invited to discuss common commercial interests, and to which five actually sent delegates. In this convention it was proposed that Congress should call a general convention to revise and make more effective the Articles of Confederation. To this Congress agreed, and twelve of the thirteen states appointed delegates to meet in convention at Philadelphia in 1787.

Unable to amend the Articles by legal means through the ineffective government set up by them, the classes and interests in the thirteen states most adversely affected by their inadequacies thus tried first to supplement them by means of trade conventions, and then set about sweeping them aside entirely in a general convention assembled for the ostensible purpose of considering their revision. Thus by circuitous means did the United States come seven years later to adopt the suggestion put forward by Tom Paine in his *Crisis Extraordinary* : " Let a continental conference be held to frame a continental charter, drawing the line of business and jurisdiction between members of Congress and members of Assembly, always remembering that our strength and happiness are continental, not provincial. . . . We have every opportunity and every encouragement to form the noblest, purist CONSTITUTION on the face of the earth ".

Directly the convention opened it was perceived that nothing approaching unanimity could be reached without a bitter struggle among the various factions. There were three fundamental divisions : the large states against the small

PHILADELPHIA  
CONVENTION  
OF 1787

DIVISIONS  
IN THE  
CONVENTION

states ; the eastern regions against the western territories ; the southern states against the northern states. The last of these divisions was thought little of at the time and was easily eliminated by a compromise, though Madison warned the convention that "The great danger to our general government is the great Southern and Northern interests of the continent being opposed to each other".

At the outset several plans were brought forward by the various interests. There was the Virginia plan, advanced by the larger states and aiming at a consolidated union ; this was given to a committee to discuss. Then came the New Jersey plan aiming at a strictly federal union with full protection of states' rights, as advocated by the smaller states ; this plan was defeated by a substantial majority of votes. Individual plans were also put forward by Charles Pinckney and Alexander Hamilton, the latter being modelled upon what Hamilton considered to be the best feature of the British constitution. Pinckney's plan was shelved and Hamilton's proved distasteful to the convention. "The gentleman from New York has been praised by everybody. He has been supported by none", remarked Johnson of Connecticut.

Finally, after a series of important compromises had been agreed to, the result of the convention's deliberations was turned over to a drafting committee. The various documents made use of in committee included the Articles of Confederation themselves, the amended and mutilated Virginia Plan (representing the views of the convention), the New Jersey and Pinckney plans (intact, but without any recommendation from the convention) and the various state constitutions. The draft returned to the body of the convention was, after fresh amendment, adopted on September 17, 1787.

The constitution in its final form was divided into seven articles, each sub-divided into sections. The first article

VARIOUS  
PLANS  
PROPOSED

WORK OF  
DRAFTING  
COMMITTEE

deals with the federal legislature and the restrictions placed on the states ; the second with the election of the head of the executive and with his powers ; the third with the judicial power, its range and mode of exercise ; the fourth, fifth, sixth and seventh with miscellaneous matters, including means of amending the constitution and conditions for its ratification by the several states.

The fundamental origins of this document are undoubtedly to be found in British constitutional history and practice ; so much indeed of the British system was embodied that a member of the convention protested : “ We are always following the British constitution, even

DEBT TO  
BRITISH  
CONSTITUTION

when the reason for it does not apply ”.

Though it is not impossible that something may have been borrowed without acknowledgment from past experiments in England, notably the Instrument of Government of 1653 (a rigid written constitution, a supreme law of the land partly inspired by the ideas of Harrington), by far the greater part of the debt is to the actual working constitution of Britain as the Americans saw and understood it in 1787 or had experienced its operation in their own lives.

The sources of their knowledge of the British constitution are important : they saw it through the eyes of Locke, who envisaged government as a contract having as its fundamental aim the preservation of property, and described the British constitution of the Revolution Settlement as such a contract ; they saw it through the eyes of Blackstone, who described it from a strictly legalistic aspect, and who, in explaining its theory, did not take into account its more recent development in practice ; they saw it through the eyes of Montesquieu, who found in the separation of powers which he imagined to be the chief characteristic of the constitution, the basis of British freedom and good government. Also, they had gained experience of the British constitution in their dealings with Britain since the revolution as well as under British

colonial administration, and in the latter they had seen an uncontrolled executive exercising a veto, aided by officials who were not responsible to the legislature. The particular slant from which they viewed the British constitution conditioned their adaptation of it to meet their needs, and moulded their application of the notions they had acquired from the law and institutions of the British monarchy to the novel circumstances of their new republic.

The state constitutions framed after the Declaration of Independence, and themselves substantially modelled after the old colonial charters, were, nevertheless, the immediate sources of the federal constitution of 1787. Many of its clauses were consciously copied from them, often word for word, and although most of the ideas behind these constitutions go back much further than 1776, the experience of the independent state governments had given these additional force and validity, or, alternatively, had underlined their inadequacy.

DEBT TO  
COLONIAL  
CHARTERS AND  
STATE CON-  
STITUTIONS

The bicameral system had been adopted by all but two of the states, and the names Senate and House of Representatives were in general use. It is therefore less remarkable that these appeared in the federal constitution than that its supporters were at such pains to justify bicameralism. "Such an institution as the Senate may be sometimes necessary as a defence to the people against their own temporary errors and delusions", wrote Hamilton in *The Federalist*. Jefferson, returning from France after the adoption of the constitution, protested to Washington over breakfast against the existence of two houses in the federal legislature. Washington is said to have met his protest with the question, "Why do you pour that coffee into your saucer?" "To cool it", replied Jefferson. "Even so", commented Washington, "we pour legislation into the senatorial saucer to cool it." A footnote for the social as well as for the constitutional historian.

The principle of having different bases of representation

for the two houses was, at a compromise, taken from the constitution of Connecticut (one of the two continued colonial charters) after the states represented in the convention had been equally divided as to whether they should adopt the Virginia plan (one house elected directly by the people and the other chosen by members of the first from among nominees of the state legislatures) or a single chamber elected by the individual states. Since 1699 Connecticut had possessed a lower house representing the separate townships and an upper house elected by the people, so it might be thought that a simple adaptation of this was the true origin of the system incorporated in the federal constitution, but Hamilton, in *The Federalist*, was at pains to point out that the *comitiae* of Ancient Rome — the *Comitia Centuriata* and the *Comitia Tributa* — voted on the basis of centuries and citizens respectively, “yet co-existed for ages”.

The office of President of the United States was modelled on the positions of the various state governors, and practically all the clauses concerning the executive headship are copied from state constitutions, while the Vice-President's functions correspond exactly with those of the Lieutenant-Governor of New York State under the constitution of 1777.

The judicial system was largely adapted from those of the states, including the principle, previously imported from Britain, that federal judges should hold office during good behaviour. The remark made in *The Federalist* concerning this section well sums up the general attitude of the framers of the federal constitution toward the state constitutions: “Contrary to the supposition of those who have represented the plan of the convention in this respect as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, and the preference which has been given to these models is highly to be commended”.

Even the first ten amendments to the constitution of 1787 consisted of selections from the bills of rights of the several state constitutions. The most solid original work of the convention has been judged to be the statement of the powers of Congress and the definition of the sphere of the federal judiciary, and even here the previous experience of state governments had been of assistance. The method of electing the President was almost the only feature of the constitution entirely without any precedent in the states, and although it met with less criticism in the convention than many long-tested principles, it was the first thing to break down in practice and to require replacement.

ORIGINAL  
WORK OF THE  
CONVENTION

But whatever its debt in detail to the state constitutions there was little or no slavish copying. The division of the legislature into two parts, with different bases of representation, is an example of those things which were adopted primarily to fill practical needs of the time. The fact that such a system had been in force in Connecticut and in ancient Rome was of minor account; it was used because it was found to fit in as a compromise between the interests of the larger and of the smaller states.

Masterly drafting made of the federal constitution of 1787 a document, in the opinion of Lord Bryce, "superior in technique to all subsequent written constitutions". In clear and simple language it carries out the stated aims and objects of its framers. The preamble having affirmed the potency and coherence of the new American nation, the body of the constitution confines itself almost entirely to defining the scope and settling the shape of government it is setting up. Its task (according to a pronouncement of Marshall's Supreme Court in 1816) had been simply "to establish three great departments of government, the legislative, the executive and the judicial departments. The first was to pass laws, the second to approve and execute, and the third to expound and enforce them." It does not attempt

MASTERLY  
DRAFTING



to catalogue the rights of man and it puts forward no fundamental claim to be self-evident.

The text concentrates upon achieving the four primary avowed objects of its framers with a minimum of verbiage. Vigour and efficiency of government were secured by means of the strong executive of Article II, and the independence of each of the three departments by means of the separation of powers and system of checks and balances elaborated in Articles I and III ; dependence of the government upon the will of the people was provided for by making all executive authority elective and by arranging for frequent elections ; the safeguarding of the liberty of the individual citizen was made doubly sure in the first ten amendments, the promise of which alone made ratification certain, although the statement of rights made in these amendments was not considered necessary by the convention, Hamilton asserting that the preamble constituted a sufficient bill of rights.

PRIMARY  
OBJECTS OF  
FRAMERS

The federal nature of the government that is being set up is made clear. The existence of the separate states is plainly presupposed ; in fact it was asserted at the time that, under the constitution " if the governments of the separate states were abolished . . . the general government would be compelled to reinstate them in their proper jurisdiction ", and Chief Justice Marshall later declared : " No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass " .

Nevertheless, its framers did not regard the constitution as merely a treaty or compact between the separate states, the latter retaining all their sovereignty. Quite apart from the variously interpreted preamble, Article VI of the constitution declares it to be the supreme law of the land. This is of vast importance, and the strength of the document lies mainly in this declaration, coupled with the

A TRULY  
FEDERAL  
SYSTEM

giving to the federal authority (Article I, section 8) not only the right to raise taxes, pay debts and provide defences, but to "make all laws necessary and proper to this end". A form of wording is thus used which makes the power granted capable of being very widely interpreted. Added strength comes from the coercive power, the direct authority given to the federal government over the citizens of the several states. "Nothing", thought Bryce, "has done more to give cohesion to the American federal system."

Though by 1827 John Marshall had begun "to fear that our Constitution is not doomed to be so long lived as its real friends have hoped", there were many in 1787 who were pessimistic about the permanence of the work of the convention. Even Hamilton admitted, "I know nothing to exempt this part of the globe from the calamities that have befallen other parts of it", and Gorham, asked "can it be supposed that this vast country, including the Western territory, will, 150 years hence, remain one nation?" That this "horse-and-buggy" constitution still remained in force for the whole nation a hundred and fifty years after the convention of 1787, is perhaps due as much as anything to the fact that the constitution was drawn up as "a layman's document, not a lawyer's document". Though it is dangerously lacking in precision in places, the fact that it confines itself on the whole to laying down general rules has allowed it to be moulded (admittedly with a time-lag and often most reluctantly) to meet the new needs of the nineteenth and twentieth centuries. The federal constitution survives today bent and not unbattered, but if it had been given the complete and detailed rigidity of some written constitutions it would assuredly have broken on the wheel of time, perhaps even before the Civil War.

FEARS OF  
IMPERMAN-  
ENCE  
UNFOUNDED

But the constitution was, as are all human institutions, the child of its age. The fetish of the separation of powers

was at its height when it was drawn up ; Northerners, as well as Southerners found it possible to recognize and provide for the existence of slavery in many of the states ; it was not thought necessary (and indeed the convention might have found this too much for it to accept) expressly to deny the right of secession ; industrial development was slight ; inter-state commerce was a mere trickle ; nationwide railways, road systems and air transport were undreamed of ; the population of the whole country was less than half that of New York City alone today. Defects and deficiencies from a present-day point of view must inevitably be found in the document. Though its framing and adoption did certain things that had never been fully achieved before in the sphere of government, like applying a democratic form of government to a large territory (previous democracies having all been small both in area and population) and showing that federalism was practicable in a large state (all precedents again being small states and their federalism rarely complete), the convention's clairvoyant gifts were practical rather than occult. Therefore, though today the constitution of the United States is the oldest and probably even now the most successful written constitution in the world, it is also to a certain extent but a venerable fossil of the ideas and horizons of a distant age. How could it be otherwise ? It was created for a mere hundred thousand square miles of inhabited territory ; it now has to serve two million square miles, three-quarters of it thickly populated. It was devised for a population of under four millions, five-sixths of which lived in rural areas or small towns, while now there are over one hundred and thirty millions, over one-third in towns of more than 25,000 inhabitants. The population of the United States was then predominantly of British stock ; today this is by no means the case, while over ten million are of African descent. It was then a country of people living mainly by agriculture, fishing

CONSTITUTION  
THE CHILD OF  
ITS AGE

and small trading, with few people excessively poor and very few excessively rich ; today more than half the population lives from manufacturing, mining, commerce and transportation, while every degree and extreme of poverty and riches are to be found in the United States.

The fact that social and economic conditions, and hence political needs, have tended to change with great rapidity in the United States ever since 1787, has made it necessary to explore every means of modifying and re-interpreting the federal constitution, a document deliberately framed to resist alteration except by a most elaborate and tedious process. The framers of the American constitution aimed to set up " a government of laws and not of men ", but it has been the experience of the United States, as of other countries, that those who carry on a government can and do remould its constitution nearer to their hearts' desire. However rigid it may be, however few the formal changes appearing upon its face, in its working it gradually begins to reflect the likeness of a new conception of things. From Washington to Jefferson, from Madison to Jackson, from Van Buren to Lincoln, from Grant to Wilson, from Roosevelt to Roosevelt, the government of the United States under the constitution undergoes great changes, yet its face is barely changed at all. *The Federalist*, *De la démocratie en Amérique*, *The American Commonwealth* and *The American Political System* describe in many respects, four different constitutions of the United States, yet the document was fundamentally the same in 1787, in 1835, in 1889 and in 1933.

Of the three main agencies of change (by amendment, by interpretation and by the growth of conventions) only the first has left its mark upon the document itself, yet only by the use of all three of these planks has the chasm of rigidity been bridged.

The most obvious but also the most difficult has been

MODIFICATION  
NECESSARY

AGENCIES OF  
CHANGE :

the official method of amendment. This method is slow and uncertain; between 1787 and 1937 only twenty-one amendments were adopted, and the first ten of these came *en masse* two years after the constitution was inaugurated. These ten amendments gave positive affirmation to freedom of religion, of the press, of speech, of assembly and of petition, declared all rights not given to the United States by the constitution to remain with the people, and sought to protect the citizen against the dangers of judicial tyranny. An extension was made to this "bill of rights" in 1798 by an eleventh amendment which slightly limited the scope of the jurisdiction of the Supreme Court. In 1804 a twelfth amendment, arising directly out of the confusion of the presidential election of 1800 substituted a better method of electing the President and Vice-President. "Anything can be altered which experience proves may be better established" Hamilton had written in *The Federalist*.

Between 1804 and 1865 the text of the constitution remained static, but between 1865 and 1870 three amendments were added to register the result of the Civil War and to end the possibility of conflict over slavery and secession. The thirteenth amendment abolished slavery in the United States; the fourteenth gave the vote to freedmen, strengthened the authority of the Supreme Court, denied the Calhoun doctrine of state sovereignty and excluded the Confederate leaders from office; the fifteenth re-affirmed the fourteenth with regard to the enfranchisement of the ex-slaves.

Then came another thirty-three years of status, followed by a fresh crop of amendments, four in seven years (1913-20), one of which (as had the twelfth) improved electoral machinery, while the other three reflected the general acceptance of certain principles of public finance, social welfare and representative government entirely alien to the eighteenth century, but which had

CONSTITU-  
TIONAL  
AMENDMENT

gained momentum in the nineteenth. The sixteenth amendment (1913) provided for the imposition of a federal income tax ; the seventeenth (also in 1913) reformed the method of electing Senators by giving the people a direct choice and taking the election away from the state legislatures ; the eighteenth amendment (1920) imposed the prohibition of intoxicating liquors for beverage purposes throughout the United States ; the nineteenth amendment (of the same year) gave female suffrage.

After another decade came two further amendments, in 1933. The twentieth introduced a minor electoral reform by reducing the time-lag between the election and assumption of office of the President, Vice-President, Senators and Representatives. The twenty-first ended the experiment of prohibition by repealing the eighteenth — the only amendment that has as yet been expressly reversed by a later one. Many thousands of amendments have been mooted and hundreds have actually been proposed, but only these twenty-one have succeeded in leaping the many-barred gate of the amendment clause.

A second less obvious but equally potent agency of change has been interpretation. The significance in the constitutional history of the United States of such men as Chief Justice Marshall, of such judicial doctrines as that of "implied powers" and of such cases as that of *Fletcher v. Peck* has been very considerable, so much so that it has been asserted that "the constitution of the United States as it actually exists today, rests to a very considerable extent on judge-made law". It is therefore not surprising that the personnel and organization of the federal courts (left undefined by the constitution) should have so often been the subject of political strife in the United States. In some countries the symbol of success for a reforming or reactionary opposition has been the connivance of the army, in others the subsidies of the leading bankers and industrialists, in yet others the backing of the *rentier* class

JUDICIAL  
INTERPRETA-  
TION

or the established church or the peasants ; but in the United States it has tended to be the benevolence of a majority of the Supreme Court, a benevolence that has been as fickle as it has been unpredictable, as essential as it has been unprocurable except by due process of time.

The third and least tangible agency of change has been usage and the growth of convention. Certain changes

CUSTOMS  
OF THE  
CONSTITUTION

have taken place in the constitutional practice of the United States that have neither been incorporated in the constitution in the form of amendments, nor crystallized in the form of judicial decisions. Thus, although there is no word in the constitution, although no judge has laid down the doctrine, it is an accepted convention that no President shall serve more than two consecutive terms of office. Another convention that is never violated is that presidential electors never actually elect the President, but merely rubber-stamp the choice of the body of citizens who have elected them ; thus indirect election of the President is as effectively dead (though still provided for in the text of the constitution) as is the indirect election of Senators (legally and formally killed by the seventeenth amendment). The growth of conventions can thus be as potent with a written and supposedly rigid constitution as with the constitution (described as "unwritten and flexible") of Great Britain, where the disuse of the royal veto, and the growth of the cabinet system crept into constitutional practice in the same stealthy way.

The position of the President as well as his mode of election have been changed almost out of recognition by custom and convention alone. John Marshall, when doubting the permanence of the constitution in 1827, also doubted "whether it will be long practicable peaceably to elect a Chief Magistrate possessing the powers which the Constitution confers on the President of the United States". He would have doubted even more the practicability of selecting the President from among candidates

each of whom had come before the people upon a programme consisting largely of legislative proposals, and who would openly remain a party leader when in office as chief executive of the nation. "This", it has been declared, "is perhaps the most significant of all the 'customs of the constitution' that have been wrought upon it by the impious hand of political parties."

This remarkable document, the constitution of the United States, for a true understanding of which in its validity today one has to read between all its lines and excavate beneath almost every word, liquidated one major crisis in the history of the United States by achieving ratification, weathered another (which it had itself helped to cause) by surviving the Civil War, and is at present passing through yet a third with what ultimate fortune it is impossible as yet to say. The surmise may be hazarded that it will emerge once again in recognizable form, for to the extent of its proved resiliency at least, the United States may be said to have a good constitution.



## CHAPTER III

### THE FIRST FRENCH REPUBLIC AND ITS SATELLITES

FRANCE in 1789 was faced with a problem at once more simple and more complex than that of America. She had no need to find a common denominator between thirteen independent and self-assertive states — indeed, one of the principal troubles of the old French monarchy was over-centralization — but on the other hand the American states had no comparable *ancien régime*, the undergrowth of which needed hacking away before new foundations could be laid or old ones repaired.

The liquidation of this *ancien régime* was the first task of the French Revolution. It was accomplished with a mixture of legality and violence and along no very clear-cut lines. Such symbolic actions as the Tennis Court Oath of June 20, the storming of the Bastille on July 14 and the abolition of seignorial rights on August 4, find their counterpart in theory in the Declaration of the Rights of Man and of the Citizen voted by the French National Assembly on August 26, 1789. With the formulation of the Declaration the honeymoon stage of the revolution was over. In four short months the gap which separated France from the *ancien régime* had widened so rapidly that turning back was already impossible ; nor was it desired, and in the Declaration the makers of the revolution nailed their colours to the mast. For them these four months had shown great promise, which had now to be fulfilled by the devising of political institutions that would permanently safeguard what the sovereign people had boldly proclaimed on paper as its own.

During the two further years that were required for the

completion of the constitution of 1791, the principles of 1789 received many shocks, and emerged twisted into strange shapes. But they did emerge in recognizable form, and the constitution of 1791, fundamentally affected as it was by the suspension even before it came into force of the limited monarchy it had set up, illogical, inadequate and inane as it was shown to be in various places by such critics as Edmund Burke, impermanent as it proved to be—remaining in force barely twelve months, though it declared itself to be unchangeable until the year 1801—nevertheless was a constitution of the people (if only of the politically articulate minority) such as France had never before possessed, and such as no other European country possessed at that time. It may have been bad for France and inapplicable elsewhere, but it at least has the significance of the egg (albeit rotten) that starts a riot. And (to parody Burke) “What a riot!”

PRINCIPLES  
OF THE  
REVOLUTION

Louis XVI, in his opening address to the States-General that met on May 5, 1789, after a gap of a century and three-quarters, made no reference to a new constitution for France (though a majority of the *Cahiers* of the provincial estates had asked for a system of national laws incorporating taxation by consent and guarantees of property of liberty, and some of them had asked for a great deal more), yet the course of the following ten years, ten years which surely shook the world as much as any decade in history, not only engulfed both Louis himself and the ancient French monarchy, but produced in France four complete and separate written constitutions, only two of which actually went into operation, and two periods of

THE FOUR  
REVOLUTION-  
ARY CON-  
STITUTIONS

“revolutionary government” involving a concentration of authority by law or decree under the stress of internal chaos and external war. The deluge to which Louis XV is reputed to have referred may well have been a deluge of constitutional documents.

France, or more particularly Paris, was, during this decade between 1789 and 1799, one vast laboratory of constitutional experiment and of rival experiments. Every imaginable ingredient was compounded, every discoverable recipe for government from the ancient and the modern world considered, and the formulae adopted were often tried on the country without control and bottled for export as universal panaceas. Any prevailing tendency or unbroken thread is difficult to trace. The alleged influence of Rousseau upon the revolution was spasmodic and the nature and extent of the incidence of his ideas is hotly contested to this day ; to the generation of the revolution he had become a cult and his name came easily to the lips, so that it may be said of him, unlike Machiavelli, that his strongest advocates were quite likely to be those who had never read him. Montesquieu appears to have exerted a more stable pressure, for, except in the interludes of emergency revolutionary government, the theory of the separation of powers is omnipresent, and all four constitutions, if not always following him to the letter, breathe the spirit of the laws. The American example, and particularly the state constitutions — “to liberty what grammar is to language” — gave piecemeal guidance, but the new federal constitution (possessing at first not even a declaration of rights) was too remote in its applicability to the immediate needs of France for easy consumption, while the oracular and revered Jefferson, who frequented the salons of the constitutionalists of the National Assembly until being called by Washington to a higher though less congenial sphere, was not himself in 1789 the most zealous admirer of those proceedings at Philadelphia two years earlier from which he had been absent.

But though the threads of influence rarely run right through the decade, and though the tendencies often run contrary to each other, the major inspirations of the

FORMATIVE  
INFLUENCES

• revolution were nearly all derivative, and it was not remarkable for its original political thought. Events moved so swiftly that there was rarely time for more than improvisation upon existing themes, brilliant as this improvisation sometimes was. The Abbé Sieyes, public constitution maker number one of the revolution, who at the outset asked "What is the Third Estate?" and stayed for many an answer, falls below Burke's standard of a statesman not only in his lack of disposition to preserve but also in his lack of ability to improve. His devices were treated with respect by the National Assembly he had done so much to make what it became, but he was excluded from the Legislative Assembly of 1791 along with all other members of the earlier assembly by the self-denying ordinance introduced by Robespierre, and continued under a cloud of impotence during the struggles of the Girondists and Jacobins in the early days of the Convention, both groups managing to produce new constitutions for France without his aid. Content simply to continue alive through the Terror, he emerged once more as a member of the drafting committee for a fourth constitution in the Year III (1794-95), but his elaborate new scheme was shelved and the constitution of 1795 owes little to him. It is ironic that this very scheme was revived by General Bonaparte in 1799, with Sieyes' connivance though with results of which he could not have dreamed, to sabotage most of those rights of man that Sieyes had worked so hard to safeguard by constitutional machinery. He lived until 1836 and Guizot must have been a man after his own heart.

Apart from the period between 1793 and 1795 when France had no constitution, but was ruled by an emergency government of executive committees elected by a sovereign legislature of revolutionary origin — a government of Dantoneseque vigour and audacity — the first decade of the French Revolution was characterized in the constitu-

CONTRARY  
TENDENCIES

SIEYES

tional sphere by high and bold professions up to which governmental instruments did not, perhaps could not, live. The effective constitutions were those of 1791 and the year III (1795); the 1791 constitution better represents the direction and extent of the reaction against the institutions or lack of institutions of the *ancien régime* (by guaranteeing the rights of man, removing privilege and departmentalizing local government), but the 1795 constitution, correcting some faults of 1791 and reacting more strongly against the revolutionary government of the Terror than against that of the *ancien régime*, is the only one that achieved any degree of permanence, and is the constitution (republican *ab initio*, whereas that of 1791 was fatally monarchical) with which France conquered and converted.

There are many similarities between these two constitutions. Both proclaimed the sovereignty of the people and carried the separation of governmental powers far; both provided a restricted franchise and indirect elections; both created a weak executive, completely separated from the legislature, with no right of initiation or veto (Louis XVI was given a suspensive

ONLY TWO  
EFFECTIVE  
CONSTITU-  
TIONS  
  
  
  
  
  
  
CONSTITU-  
TIONS OF 1791  
AND 1795  
COMPARED

veto, the Directory had none) and no power of dissolution. Their most obvious differences lay in the facts that one was monarchical, the other republican, and that in 1795 a second chamber — the first of the revolution — was added to the national legislature. The 1795 constitution had the great advantage of building upon unencumbered ground. The various acts of the first National Assembly had cleared away much of the *ancien régime*, and the Legislative Assembly and the Convention had between them removed every remaining trace. What the makers of the constitution of 1795 destroyed was principally the new, and what they regarded as the excessive, growth of the two preceding years; the suspended Jacobin constitution of

1793 was finally killed as "nothing but anarchy organized"; the executive committees and the Revolutionary Tribunal were suppressed, and the Jacobin clubs (which had played so important a part in the emergency government) were closed. Apart from the retention of the republic, the general tendency was to go back for inspiration to the fountain-head of the spirit of '89 (a tendency which gave to Sieyès renewed prominence), but the local government division known as the district, created as intermediate between the department and the canton by the law on local government of December 22, 1789, was eliminated. This had been the law for which Burke had reserved some of his most incisive criticism, seeing in it "a direct and immediate tendency to sever France into a variety of republics" and scorning it as "the project of turning a great empire into a vestry", while Louis XVI, in the document he left behind him on his flight to Varennes complained bitterly that the interior administration of the country was left entirely in the hands of the new departments, districts and municipalities, over which the central government could exercise no effective control. In theory these local bodies were subordinated not to the central executive but to the central legislature, but it was not until the Convention began sending around representatives on mission and the local Jacobin clubs began to assist the revolutionary government to control local affairs that this link became in any way effective. With the disappearance of the revolutionary government the danger of the country becoming "a variety of republics" reappeared. The suppression of the district simplified the task of central control, but the departmental administrations still remained dangerously independent, so it was provided (articles 191 and 192 of the constitution of the year III) that the central executive Directory should nominate in each department a local citizen to act as their *commissaire*, a compromise between the ineffective arrangement made

LOCAL  
GOVERNMENT  
DIFFERENCES

in the constitutions of 1791 and 1793 and the ruthless vigour of the system of representatives on mission. Bonaparte restored the district under the name of *arrondissement* by the law of 28 Pluviôse of the year VIII (February 1800) but by making the chief official in every local administration, whether department, *arrondissement* or commune, his own nominee, ensured a control far more effective than that of the revolutionary government, and, in practice, more thorough-going and autocratic than that of the *ancien régime* itself.

The constitution of 1795, in its reaction against the lack of precision of 1791 and the lack of restraint of 1793 and 1794, did not go so far as Bonaparte in 1799 and omit a declaration of rights altogether, but it did label its declaration "Rights and Duties" (the addition of duties having been proposed, but successfully resisted, in 1789 and again in 1793) and it did restore Liberty to the pride of place it had occupied in the original declaration of 1789 as the first of the rights of man. Equality had not been mentioned in 1789 when the rights had been listed as "Liberty, Property, Security, and Resistance to Oppression", but had been inserted next after Liberty by the Girondists in 1793 (who completed their list with Property, Sovereignty of the People and Resistance to Oppression) and the Jacobins put Equality first of all (it was followed by Liberty and Security, with Property last. Resistance to Oppression was not mentioned). This Jacobin declaration elaborates its statement of the rights of man to the extent of asserting (article 21) the right to work or subsistence from society. This article casts a longer shadow into the nineteenth and twentieth centuries than perhaps any other clause from the constitutional documents of the first French Revolution, documents derivative in so many other places from ideas current in the seventeenth century or earlier. It reads: "Les secours publics sont une dette sacrée. La société doit la subsistence aux citoyens

RIGHTS OF  
MAN,  
1789-1799

malheureux, soit en leur procurant du travail, soit en •assurant les moyens d'exister à ceux qui sont hors l'état de travailler." It was such words that made of the Mountain a volcano.

Such dangerous conjugations of the words Equality, Liberty, Security and Property were too warm-hearted for the men of Thermidor, to whom Liberty meant *laissez faire* and involved the negation of the right of workers to combine or political societies to organize (articles 360-362 of the constitution of the year III); to whom Equality meant not the universal THE SPIRIT OF '95 manhood suffrage of the Girondists and Jacobins, but a citizenry of direct taxpayers only and a franchise only slightly less restricted than that of 1791 (when Equality had not been mentioned); to whom the right of Property, though discreetly retained in the background of their declaration of rights, involved a high property qualification for membership of an electoral assembly (article 35, constitution of the year III). It might be said that their interest in the rights of man was strictly platonic, though Plato himself, it was claimed in the debate on the constitution, would be excluded from citizenship by article 12. The reply by Lanjuinais to this objection may be said to sum up the very spirit of '95: "Si l'article fait perdre un Platon, il délivre de beaucoup d'intrigants".

These four constitutions of the first French Revolution differed very considerably, then, in spirit and in content. Their declarations of rights give a rough indication of the spirit in which they were conceived, though it must always be remembered that the period of gestation for the constitution of 1791 was over two years, during which much happened to give some people second thoughts concerning both the rights of man and his nature, while that for the other three constitutions was only a few months or weeks. The high-water mark of revolutionary endeavour in the direction of the sincere constitutional



realization of the rights of man and the sovereignty of the people was undoubtedly the Jacobin constitution of June 24, 1793. Considering its high qualities this document was completed with amazing speed and skill by men who at the same time were having to organize the

JACOBIN  
CONSTITUTION

defence of their country against an armed coalition of the leading powers of Europe. Though the shortest, it is by far the most impressive to political science of the four constitutions.

The constitution of 1791 runs (without its declaration of rights) to 236 articles arranged in great confusion ; the constitution of 1795 contains 377 articles and is padded with sentimentalities and repetitions ; the incredible Girondist draft constitution of February 1793 has no

GIRONDIST  
CONSTITUTION

fewer than 391 verbose articles and is a fitting monument and memorial to the wordy and unworldly enthusiasts who compiled it. In a time of national crisis it provided an executive weaker even than that of 1791 (it was not to be responsible and its personnel was to change every fourteen days) and in accordance with the traditions and philosophy of the Girondist party it did nothing in its hatred of Paris and of centralization to correct the inadequacies of 1789 and 1791 in the sphere of local government. The provision of referendum and initiative on a communal basis without adequate machinery for preventing abuse of these rights led straight toward anarchy, or, at best, an evanescent confederation of Burke's 44,000 vestries. The fate of the Girondists must be deplored, but the fate of their constitution need not be regretted.

Compared with the other three the Jacobin or Montagnarde constitution was a concise document of 124 articles, taking almost the same number of words to provide for France a genuine system of government grounded upon truly democratic principles, as Napoleon Bonaparte required in 1799 to erect a sham façade of representative government before his constitutional absolutism. The

Jacobin constitution, in its declaration of rights, subscribes to the greatest good of the greatest number as the object of society and government (article 1), the right to work or maintenance (article 21), the need for universal education (article 22), the right of a people to change its constitution at any time (article 28) and the right of insurrection against tyranny (article 35). In the body of the constitution these and other declarations are implemented by universal manhood suffrage — also advocated by the Girondists — (article 4), by elective administrators and judges (article 9), by popular ratification of laws (article 10), by the second ballot in elections to the legislature (article 26), by the annual meeting of the local and national assemblies (articles 32, 39 and 40), by a responsible and representative executive council chosen by the legislature and able to take part in its deliberations (articles 63 and 75), and by machinery for calling a national convention for constitutional revision (articles 115–117).

FEATURES  
OF JACOBIN  
CONSTITUTION

Though this constitution was accepted by the people, in the first popular referendum in French history, by a majority of 1,800,000 votes against 11,000, it happened that it was never put into force. Such were the emergencies of those days that even its framers themselves feared to undertake such a bold experiment in democratic government at such a time. By the time the national emergency had passed the chance of putting this constitution into operation had gone for ever. The reactionaries hated it both for what it was and for those who had made it, for its democracy as well as for its association with the Mountain, and, characterized as “anarchic”, it was consigned to the dustbin from which the Abbé Sieyes had just re-emerged with a new *Verwässerungsplan*.

During the period of the Jacobin constitution of 1793 France was still fighting to preserve her frontiers from a coalition of enemies, but by the time the constitution of 1795 had been adopted the tide had already turned ; she

had herself invaded the territories of her enemies and had reduced their number by the treaty of Basel. The period of the *régime* of the 1795 constitution in France was to be that of even more spectacular successes of her new armies in the Netherlands, in central Europe and in Italy.

As she conquered it (as Sorel has so masterfully shown), France converted Europe to her own new way of thinking and acting, notably in the sphere of government; but the latest Paris fashion when the countries on her borders began, either under her direct domination or under her spell, to remodel their institutions on French lines, was not the democratic constitution of 1793, but the compromise constitution of 1795 — the rights of man, but not too many; the sovereignty of the people, but not too much; the rump of the revolution that survived Thermidor and Vendémiaire.

Therefore the constitution of the Batavian republic of 1798 provided that an executive Directory should rule over one and indivisibly united provinces; the constitution of the Helvetic republic of the same year, running counter to a confederate tradition five centuries old, gave a united Switzerland a central legislature of two houses and a central executive Directory of five; while the new Italian republics appeared in their French constitutional *couture* as a set of sextuplets differing only superficially as to size, colour and mannerisms. The Cispadane constitution of 1796 set up at Modena a national assembly of the approved pattern; the Cisalpine constitution of 1797 provided a Directory at Milan with its appropriate legislature; the Ligurian constitution of 1797 provided at Genoa an administration French in all but name; the Roman constitution of 1798 eliminated Papal rule and titillated the historic memory of the *civis romanus* with a translation into terms familiar to him of the same French model; finally, the Parthenopæan constitution of 1799 set up

“ CONQUEST  
AND  
CONVERSION ”  
OF EUROPE

NETHERLANDS,  
SWITZERLAND,  
ITALY

the familiar Directory of five at Naples, only for it to fall apart soon afterwards, at a touch half Nelson and half Hamilton.

Indeed, all of these derivative constitutions and most of these satellite states were short-lived. Those that survived the counter-attacks of the coalitions succumbed to the exigencies of Napoleonic statecraft.

Republics one and indivisible were to go out of fashion and their very names were to disappear beneath the purple of the first Empire. Only the Helvetic republic retained its identity, profoundly modified. But in their short span of existence these 1795 model constitutions meant and achieved much. In the satellite states, as in France, the Directory of five might go, the Ancients and the Five Hundred might go, liberty, the sovereignty of the people and, eventually the republic one and indivisible itself might go, but one thing at least was certain, the *ancien régime* had gone before them, and, while Napoleon ruled, the *ancien régime* remained a lost Atlantis.

CONSTITUTION  
OF YEAR III  
THE MODEL

## CHAPTER IV

### THE INSPIRATION OF FRANCE AND AMERICA

THE stimulus toward constitution making produced by the American and French revolutions was not confined to the United States and France. The constitutions of the satellite republics which were first conquered and then converted into miniature reflections of the France of 1795,

**VOLUNTARY  
AND  
ENFORCED  
EMULATION** were in no sense freely adopted, for they were presented to the people without alternative by Bonaparte and the other generals of the Directory. In these states, though their new constitutions were in most cases, and rightly so, regarded as bringing a degree of domestic freedom hitherto unknown, France did not so much inspire as dictate.

But beyond this immediate orbit, within which France exerted such a strong attraction that resistance to the reception of her institutions was not possible, there lay states which, quite voluntarily, came under the constitutional influence of her revolution. In the case of the United States there was no immediate orbit (though at times there were those who would have liked to have seen an irresistible attraction at work on Canada) but an even wider voluntary adoption of political institutions similar to hers.

It is not always the successful constitution that is imitated with satisfactory results. The failure (to bring  
**SUCCESS AND  
FAILURE OF  
ADAPTATIONS** stable government and the blessings of liberty) of the various copies of the United States constitution of 1787 made by the countries of South and Central America which became independent of Spain early in the nineteenth century, contrasts strongly with the skilful adaptation of the unpromising

material of the French constitution of 1791 to the needs of the Norwegian people in 1814 for the framing of a fundamental law which still remains in existence, in essentials unchanged. It is true, of course, that another and more slavish imitation of the French constitution of 1791, made in 1812 by the Spanish people, had a fate as unhappy, despite the fanatical loyalty which Spanish liberals continued for a generation or more to give to its memory, as the destiny of the Norwegian constitution was to be fortunate. It is true, also, that features of the American constitution reappeared at a rather later date in other constitutions (notably in Switzerland and in some of the British dominions) where, the peculiar conditions of Latin America being absent, they have proved to be of permanent advantage.

The period of experimental republicanism in America and France between 1776 and 1799, produced three constitutional types in each country; the various unitary state constitutions, the confederate articles of 1781 and the federal constitution of 1787 in America; the limited monarchy decentralized and anarchic of 1791 and the republics one and

SIX POSSIBLE  
MODELS

indivisible of 1793 and 1795 in France. Of these only the state constitutions (with one or two exceptions) and the federal constitution of 1787 achieved any degree of permanence, yet five of these six forms were paid the compliment of conscious imitation in other countries during their own generation. Alone, the Jacobin constitution of 1793 had to wait over half a century before providing acknowledged inspiration, and then it was in France herself. The world was too busy trying to forget the Jacobins and all their work.

The stamp of the French constitution of 1795 was imposed by the generals of the republic as they conquered, but the others were freely adopted and adapted abroad as the occasion arose. Reference has already been made to the influence of the bills of rights of the American state

constitutions upon the French Declaration of the Rights of Man and the Citizen of 1789 and its successors, and insofar as these in their turn provided inspiration elsewhere, the American influence may be said to have been indirect as well as direct. But one very early influence of the institutions and constitutional documents thrown up by the American Revolution, though not in France, was direct enough. Nor was it confined to use of the state declarations and bills of rights.

The reforms which Joseph II introduced in the Austrian Netherlands, and his toleration decrees and centralization of government in particular, caused great unrest culminating in the insurrection of 1787. The leaders of the revolution declared for the independence of their country as the Belgian United States, and drew the outlines of a constitution. As the basis of this constitution was settled before the American constitution of 1787 was framed, and as the revolt had been primarily against centralization, it is not surprising to find (though this was overlooked by Pirenne) that the Belgian United States turned not only for a name but for the details of their government to the loose confederation of sovereign states then existing in North America. Presumably unaware that the Articles of Confederation were proving so inadequate in the land of their origin, the Belgians sought inspiration in them, and the publication and ratification of the American federal constitution did not cause them to desert the articles, for their completed constitutional draft published in 1790 has neither the separation of powers, nor the bicameral legislature, nor again the strong President provided by the federal constitution, but sets up a loose confederation giving full recognition to local particularism. It does not provide for the direct election of members of the legislature, and its president is no more than a presiding officer. It was a conscious and avowed copy of the Articles of Confederation.

ARTICLES OF  
CONFEDERA-  
TION AND  
SOUTHERN  
NETHERLANDS

- Whether this form of government would have proved more suited to the Belgian United States than it did to the United States of America was not to be tested, for the revolution was suppressed and Belgian independence was postponed until 1830. The constitution of 1831 was to set up a unitary monarchy far removed both in spirit and in stimulus from the confederate republic projected in 1787-90.

The Articles of Confederation were not again regarded as worthy of attention by constitution makers until the eleven southern states which seceded from the union in 1861 borrowed some of their features (combining these with those parts of the federal constitution still congenial to them) in organizing the Confederate States of America, but the federal constitution, though passed over almost entirely by Europe until a much later date, was paid the sincere flattery of general imitation by the countries of Latin America which, one by one, had to devise forms of government for themselves, after declaring their independence of Spain from 1811 onward and obtaining recognition of their separate sovereignties from the United States and Great Britain. The fact that the United States was prepared even to go so far (in the Monroe declaration) as to seem prepared to guarantee the collective independence of these new states, while at the same time the powers of the Concert of Europe were preparing to invade Spain herself in the interests of her *ancien régime*, may well have been influential in predisposing Latin America towards forms of government similar to that which by then appeared so firmly established in the territories of its guarantor, but it was also genuinely believed that the adaptation of the United States constitution of 1787 to the various needs of these emancipated countries, was the best way there also to "establish Justice, insure domestic tranquillity, provide for the common defence, promote the general Welfare, and secure the blessings of

UNITED STATES  
CONSTITUTION  
AND LATIN  
AMERICA



Liberty", and, in the several cases where a federation of smaller units appeared practicable and desirable, "to form a more perfect union".

It must be conceded that, except at rare intervals, the countries (now numbering twenty) of Latin America, have been conspicuously lacking in justice, domestic tranquillity and the blessings of liberty. Along with other features of the United States constitution, the institution of a president or head of the state with ample powers was adopted, the vice-regal tradition permitting these powers to be made even more extensive than in the United States, and in the chaotic and undeveloped conditions of these new republics the form of government was from the outset, or rapidly came to be, not "democracy in America" but presidential despotism, despite the practice of making the "Minister of State" responsible for all acts of the President. "Plato and Aristotle would have described them as forms of tyranny, i.e. illegal despotisms resting on military force."

This was not to be, as might have been expected, a mere temporary or transitional state of affairs. After over a century, despite their liberal constitutions, nowhere in the republics of Latin America has government strictly according to the constitution become the norm, "nor would it be safe to assert that the Age of Dictators has passed in a single nation of Spanish America". Signs of change have, of course, not been absent. The more refined methods and more subtle aims of a Vargas or a Gómez in the twentieth century are not to be compared with the crudities of a Francia or of a Rosas in the nineteenth. In the Argentine, in many ways the most developed politically and economically of the nations of South America, it has been noticed by Bryce as a sign of grace that more latterly the dictator has invariably been a Doctor of Laws rather than a general, but despite this advance "although the government is democratic in form and not palpably undemocratic in practice, the rule of

PRESIDENTIAL  
DESPOTISM  
DEVELOPS

public opinion is not yet fully established". In Chile parliamentary institutions really appeared to be taking root prior to the new "constitutional" *régime* of 1925.

Saddled by the well-meaning but naive patriots who liberated them, with constitutions cut to a measure that was not theirs, the countries of Latin America have undoubtedly suffered more than they have gained from trying to live up to the example of the United States in the sphere of government. It was like fitting aeroplane engines into a fleet of post-chaises. A great amount of noise could be made therewith, but for purposes of locomotion the nearest donkey was of more value, and, too often, that was exactly how they did get along. A less ambitious start with simple governmental machinery, incorporating indigenous or familiar institutions wherever such happened to exist, might have produced less turbulent results and in the long run have provided more safeguards to life, liberty and the pursuit of happiness. On the other hand the view has been expressed that "An orderly *régime* in independent Spanish America would have meant a hierarchy of churchmen, landlords, mine-owners and wealthy merchants, with a following of creole lawyers, physicians, army officers and the like. It would have made impossible the rise of such men for instance as Juarez, Diaz, Santa Cruz, Paez, Flores, Sarmiento and Castilla. In the midst of revolution there flourished a sort of anarchistic equalitarianism since all were equal before the dictators with their extensive powers. The comparatively easy achievement of military rank was a democratizing influence which placed on the same level men of all classes and all strata." This may be putting the best face possible upon these dictatorships, but it is hardly an argument against an orderly *régime*.

DICTATORSHIP  
THE GENERAL  
RULE

As it happened, a reasonably orderly *régime* under a constitutional form of government which worked, did actually exist in Latin America for over half a century.

It is perhaps significant that this *régime* was in two important particulars an exception to the accepted plan of the Latin American countries. Brazil was, until 1889, a monarchy, and her constitution of 1824, which survived as long as the monarchy itself, was not modelled upon that of the United States. The Brazilian constitution of 1824 organized a form of limited monarchy which was, at third remove, that of France in 1791, the intermediaries being the Portuguese constitution of 1822 and the Spanish constitution of 1812. Under this constitution the sovereignty of the people was not definitely conceded, but the limitation of the monarchy and the existence of certain definite rights of the subject were never in doubt. The almost bloodless revolution of 1889 which banished the emperor, brought Brazil into line with the rest of Latin America as a republic, and "the framers of the Brazilian constitution of 1791 hitched Brazil's political wagon to the stars and stripes". Since then Brazil has fallen easily into the tradition of dictatorship and presidential tyranny of her neighbours, until 1924 within the existing framework of the constitution of 1891. In 1924 the constitution was "amended" to strengthen the legal power of the President by weakening the autonomy of the states of the federation, by facilitating the application of his veto and by imposing restraints on the liberty of the subject. An unsuccessful stand in 1930 against these tendencies produced from the government an entirely new constitution in 1934, this time not modelled so closely upon that of the United States of America and described by the Opposition press as "disguised fascism". In 1937, as his term of office was about to expire, President Vargas caused the short-lived constitution of 1934 (under which he was not eligible for re-election) to be replaced by a fresh constitution which, beside allowing him to remain in office for a third term, completed the deviation of the Brazilian republic from the Pan-American constitutional

BRAZILIAN  
EMPIRE AN  
EXCEPTION

BRAZILIAN  
REPUBLIC NO  
EXCEPTION

line, and (in the view of his critics in neighbouring states, for criticism in Brazil was no longer vocal) removed the disguise from the fascist tendencies already discerned in 1934. President Vargas has replied that "Our constitution is neither fascist nor integralist. It is Brazilian", and the Brazilian fascists have already given evidence of their dislike for it. Certainly it is neither in the European tradition of the constitution of 1824, nor in the American tradition of that of 1891. Upon hearing of the downfall of the Brazilian monarchy in 1889, the President of Venezuela is said to have remarked, "That is the end of the only republic that ever existed in America". The constitution of 1937 may prove to be founded upon a paradox equally platonic.

The constitutional history of Brazil has indeed been grounded upon paradox, as much under the empire as under the republic. In 1807 the Portuguese court and government fled to the colony of Brazil before the in-march of Napoleon's armies, and even in 1816 when the regent

CONSTITU-  
TIONAL  
PARADOX  
IN BRAZIL

succeeded to the throne of Portugal as John VI, he remained in Brazil. The revolution of 1820 resulted in the temporary adoption there of the Spanish constitution of 1812, and when the liberal movement spread to Brazil in 1821, John VI was forced to accept it there as well. A new constitution for Portugal and her empire was framed by the *Cortes* at Lisbon in 1822, and the king swore to uphold it. It made of him a constitutional monarch confined to executive functions, with a single chamber legislature wielding all legislative power, and the sovereignty of the people was recognized. The model was still clearly the Spanish constitution of 1812, and the tradition that of the France of 1791. The leaders of Brazil, dissatisfied with the small regard paid to her interests, and theirs, in this constitution making, declared her independent of Portugal in 1822, and (the king having at

INFLUENCE  
IN PORTUGAL  
AND BRAZIL  
OF SPANISH  
CONSTITUTION  
OF 1812

last returned to Portugal in 1821) proclaimed the prince regent Dom Pedro as constitutional emperor of Brazil. Meanwhile the new Portuguese constitution had been suppressed by the king's nephew, Dom Miguel, in 1823, and the Brazilians in their turn proceeded to frame a constitution for themselves, modelled on the Spanish of 1812, but remodelled by Dom Pedro in 1824. By an amazing display of jugglery, during which the crowns of Portugal and Brazil remained in the air together, the complicated situation between the two countries was straightened out by John VI being acknowledged emperor of Brazil as well as king of Portugal in 1825, on the condition that he should immediately abdicate the former throne in favour of Dom Pedro, and, as king of Portugal, recognize the independence of Brazil. This was done, but to complicate matters afresh, John VI died in 1826 and the Emperor Pedro I of Brazil, though remaining in his own country, was acknowledged king of Portugal as well. He immediately divested himself of the throne of Portugal by abdicating in favour of his daughter Maria, but, acting as regent for her, gave Portugal a new constitution in 1826 to replace that of 1822. But this constitution was in the tradition of the legitimist French charter of 1814, and the stimulus of 1812 and of 1791 was absent. To complete the story, Miguel usurped the crown of Portugal in 1828 and Pedro I abdicated in Brazil in 1831, but this time the two countries remained separated, both as to their crowns and to their constitutions.

The famous Spanish constitution of 1812, which breathed constitutional life into Portugal and Brazil, was a painstaking copy of most of the features of the French constitution of 1791. The Spaniards of that day had either not read Burke or else they held his opinions of no account. Insulted by the imposition upon them of a Bonapartist constitution and king in 1808, the leaders of the national movement against Napoleon called together a *Cortes* at

SPAIN, 1812,  
COPIES  
FRANCE, 1791

Cadiz in 1810 to frame a national constitution. This *Cortes* itself broke decisively with the *ancien régime* by sitting as two houses (later amalgamated as one) instead of three estates as had the ancient but obsolescent *Cortes* of Castile, Aragon, Valencia and Catalonia, and as had even the *Cortes* created by the Napoleonic constitution of 1808. The *Cortes* of Cadiz then proceeded to frame a constitution that would at one and the same time proclaim the emancipation of Spain from the Bonapartes and from the *ancien régime*. But they desired the return of their legitimate king, Ferdinand VII, though as a limited, not as an absolute monarch, and the France of 1791 presented them with the only available model of a constitutional text combining their desire for both limited monarchy and popular sovereignty.

The constitution of 1812, which emerged from the deliberations of the *Cortes* of Cadiz, followed the French constitution of 1791 closely. It contained no separate declaration of rights, but at the outset it declared serfdom abolished (article 2), proclaimed the sovereignty of the people (article 3) and guaranteed liberty, property and "the other legal rights of all individuals" (article 4). Then, going rather beyond 1791, it declared it to be the duty of every citizen to pay taxes and to defend the state (articles 8-9). It provided for an hereditary monarchy specified definitely as "limited" (article 14) and introduced the principle of separation of powers, though declaring that the legislative power was in the hands of "the *Cortes* and the King" (article 15). Citizenship was not restricted as in 1791, but there were a number of exclusions, and citizenship was to be suspended for various reasons, among the most interesting being for having no business or craft and no ascertainable means of subsistence (article 25, section (d)) and (in the case of persons becoming otherwise eligible for citizenship from 1830 onward) being unable to read and write (article 25, section (e)). The

DIFFERENT  
BASIS OF  
CITIZENSHIP

operation of the time-spirit was therefore not entirely absent.

It was with regard to the legislative body that the imitation of 1791 was most slavish. A single chamber *Cortes* containing one deputy for each seventy thousand of the population, elected indirectly through a series of parish, district and provincial electoral assemblies, was to meet annually and to sit for a term of two years. No deputy was to be eligible to sit in two consecutive *Cortes*, an echo and a codification of the notorious self-denying ordinance of 1791.

The royal veto, as in 1791, was only suspensive. The king had thirty days in which to return a bill to the *Cortes*, and if he did not it became law without his concurrence. A bill returned by the king could become law without his assent if passed by the *Cortes* three years in succession. In this and in many other ways the strictly limited nature of the monarchy is established without a shadow of a doubt, article 172 beginning (ominously for Ferdinand VII) : "The following are the limitations to the power of the king". Ominously (as it turned out) for the constitution itself, there are thirteen of them !

Advances upon the constitution of 1791 are seen in the nomination of the heads of the provincial administration by the king (article 324) to avoid the danger of excessive decentralization — particularly important in a country of strong local particularisms — in the provision for a national educational system (articles 366 to 371) and in the veto upon constitutional amendment for a period of eight years instead of ten (article 375). After that period had elapsed, a special deputation (or convention) was to be called together whenever constitutional amendments were proposed (article 376 onward), a procedure superior to that provided in 1791, and probably borrowed from the United States.

This constitution runs to 384 articles and is in places incredibly verbose. Despite its occasional improvement upon the original, it may be said to stuff Spain into the somewhat strait jacket of 1791 rather than to cut the coat to suit the contours of Spain. This did not contribute toward either comfort or durability and, worst of all, a constitution on a French revolutionary model could not be acceptable to a Spanish Bourbon such as Ferdinand VII, whom, with simple faith, the *Cortes* invited to return and take an oath to uphold the constitution. When he did return in 1814 Ferdinand brought the *ancien régime* back with him as far as he could, and the constitution was suppressed. With great pertinacity its supporters revived it during the revolution of 1820, and for three years were able to force Ferdinand to honour it. He was delivered from this fate, to him almost but not quite worse than death, by the righteous intervention of the Concert of Europe in 1823, and the constitution of 1812 was killed again. But it lived on in the imagination and the blood of the Latin peoples of Europe (which it had already stirred in 1820 in Portugal, Naples and Sicily) as a banner of liberalism and revolt. Like the French constitution of 1791, to which it owed so much, it was as a stone cast upon the surface of the modern constitutional stream, sinking out of sight immediately, but leaving behind it widening circles of influence and unrest.

FATE OF  
SPANISH  
CONSTITUTION  
OF 1812

How different was to be the destiny of the Norwegian constitution of 1814, which created a strictly limited monarchy based upon the sovereignty of the people, by free adaptation of the tradition of 1791 to the special needs of a country for centuries remote from the highways of European affairs. This adaptation was to create a liberal state which proved capable of developing under it into a free and independent democracy, but, perhaps through the very quietness of its success in this far corner of Europe,

NORWEGIAN  
CONSTITUTION  
OF 1814 ALSO  
DERIVES  
FROM 1791



the Norwegian constitution was to cause little stir abroad, even in the sister country of Sweden, linked to Norway for ninety years in a personal union, yet possessing all that time a constitution less liberal and a monarch (though he was the same person) less limited in his powers than Norway herself.

After centuries of subjection to Denmark and her absolute monarchy, the Norwegians found themselves free

NORWAY  
MOMENTARILY  
INDEPENDENT

once more, but in imminent danger of being absorbed by Sweden. The Norwegian estates, meeting at Eidsvøld, declared the independence of Norway, invited a Danish prince to be their king, and promulgated a constitution. Almost immediately they were forced to abandon the king of their choice and to accept the king of Sweden in his stead, but in almost every other respect they were able to retain their newly declared independence. The constitution was amended to provide for the personal union with Sweden, but the new text of November 4, 1814, does not differ in essentials from the Eidsvøld constitution of May 31. Bernadotte, already crown prince of Sweden, emerged with the prestige of a sovereignty over the whole of the Scandinavian peninsula, but in order to succeed to this destiny peaceably he had to concede to Norway an autonomy that was little short of complete independence. Of this autonomy his oath to preserve the constitution of 1814 was the guarantee. To the Norwegians he became simply king of Norway.

The Norwegian constitution of 1814 was a severely practical and precise document of 112 articles. It con-

UNION WITH  
SWEDEN  
UNTIL 1905

tained no separate declaration of rights and at Eidsvøld had no preamble. A preamble was added to state the circumstances of the union with Sweden. This preamble was of course deleted when the connection between the two countries was ended in 1905.

The kingdom of Norway is declared, in language

having a tang of the French Revolution, to be free, independent, indivisible and inalienable, and its form of government to be "a limited and hereditary monarchy" (article 1). The executive power is vested in the king (article 3), who has to take an oath to maintain the constitution and the laws (article 9), who chooses a ministerial council and a chief minister (article 12), who can issue temporary decrees not at variance with the constitution or the laws (article 17) and who, acting on the advice of his ministers, appoints all state officials (article 21). Any order issued by the king needs countersignature by a responsible minister to be valid (article 31). He is commander-in-chief of the armed forces, but their regulation is a matter for the legislature (article 25). He can grant no personal or hereditary privileges and can only confer titles that carry office with them (article 23).

"A LIMITED  
AND  
HEREDITARY  
MONARCHY"

"The People shall exercise the legislative power through the *Storthing*" (article 49). This legislative body was to be elected for three years (article 54) by indirect election, one elector to be appointed for each 50 voters in towns and for each 100 voters in country districts (article 57). The franchise was restricted to men over 25 years old who had resided in the country for five years, were substantial landowners or tenants, town burghers or state officials (article 50). Members of the legislature had to be at least thirty years old and residents for at least ten years (article 61). Parliamentary immunity was accorded them (article 66).

THE  
LEGISLATURE

The most interesting and novel feature of the whole constitution lay in its compromise between unicameralism and bicameralism. A single legislature was to be elected, but, after assembling, was to be split into two divisions by the whole body of the *Storthing* electing one-quarter of its members to constitute a second chamber, called the *Lagthing*. The remaining three-quarters were to be collectively known as

UNIQUE  
DIVISION OF  
"STORTHING"

the *Odelsting* and the two bodies were to continue to meet separately as constituted at the beginning, throughout the whole life of each *Storthing* (article 73). The merits of the Norwegian system have been hotly debated by supporters and opponents of bicameralism, and from its working have been taken arguments for both sides. It has never been closely imitated in any other country, but a number of subsequent constitutions have provided for the choice of part of the upper house by the lower, the latest being that of Denmark in an amendment made in 1938.

Laws are introduced in the *Odelsting* (on the proposal of that body or of the government) and then pass to the *Lagthing*. A joint session of the two bodies takes place after the *Lagthing* has twice rejected a bill submitted to it by the *Odelsting*, and in joint session can be adopted by a two-thirds majority (article 76). Legislation passing either in this way or through the two bodies separately is submitted to the king, who has a suspensive veto only, for a bill passing three successive *Storthing* in identical form, with general elections intervening, becomes a law without the royal assent (article 79).

The *Storthing* is thus a very powerful body. It also controls the finances of the kingdom, raises annual taxes, approves loans, and has the right (in some cases only through a special committee of nine) to see all treaties and diplomatic correspondence of the state (article 75). Its debates are public (article 84) and any disturbance of the liberty or security of the *Storthing* is declared by the constitution to be treason (article 85). The *Lagthing*, together with the members of the Supreme Court, constitutes a tribunal of state or *Rigsret* to try ministers, judges or representatives on the accusation of the *Odelsting* (article 86).

The "General Provisions" at the end of the constitution come near to containing a bill of rights. New civil and criminal codes are promised; trial is to be only

POWERS OF  
"STORTHING"

in accordance with the law, and torture is prohibited ; no *ex post facto* laws are to be passed ; freedom from arbitrary arrest, liberty of the press, the sanctity of the home, compensation for property compulsorily surrendered to the state, and freedom of industry (with a prohibition of monopoly granting) are guaranteed (articles 94-105).

Amendments (none of which may be contrary to the spirit or fundamental principles of the constitution) have to be accepted by one *Storthing* (a simple majority sufficing) and printed, and then must pass the next *Storthing* (after a general election) by a two-thirds majority, after which they become part of the constitution without any royal assent being necessary. This means a gap of at least from two to three years between the first passing of a proposed amendment and the earliest time it can come into force.

There have been a number of important amendments to the constitution on points of detail during its existence of a century and a quarter, but in fundamentals it remains unchanged. Apart from the separation from the personal union with Sweden and the taking by Norway of a separate royal dynasty in 1905, the most important alterations have been the provision for annual meetings of the *Storthing* (1869), progressive widening of the franchise culminating in universal manhood and womanhood suffrage without qualification, and the introduction of direct election of the *Storthing* by the people (1905). Proportional representation was adopted in 1920.

The Norwegian was a constitution originating in a popular movement and was given by a people to itself, not by a king to his people. The people reserved sovereignty to itself and accorded only limited powers to the monarchy. It is the sole survivor of that small but scattered group of constitutions that may be said to have been born under the star of 1791, and the only one to

" GENERAL  
PROVISIONS "

AMENDMENT

CONSTITU-  
TIONAL  
CHANGES  
SINCE 1814

have had an independent existence of any consequence. The Holy Alliance did not pay it the compliment of considering it important or dangerous enough to require crushing, and the world has not paid it the compliment of any extensive imitation. Nevertheless it has served Norway well and would undoubtedly have found favour in the eyes of Aristotle.

## PART II

### BONAPARTIST CONSTITUTIONS— THE PREFABRICATED STATE

## *Bonapartist Constitutions — The Prefabricated State*

*The constitutions associated with the name of Napoleon Bonaparte were neither republican nor spontaneous, but the republican nomenclature was retained for a time and the device of the plebiscite was used to preserve the illusion of response to popular demand. That he cared little for constitutional forms is evidenced by his readiness to ignore the details of constitutions he had himself made. That he had little constitutional originality is shown by his willingness to use the plans of others after giving them a characteristic Napoleonic twist.*

*His ideas on government were simple and direct, though the means he employed to put them into effect were subtle and devious. His inability to become a Director under the constitution of the Year III (the minimum age being prescribed as forty) had more to do with his decision to destroy that constitution (a constitution which he had imposed with apparent relish upon the territories conquered by his armies) than had any more theoretical objection to it on his part. Had he been able to dominate the government of France from within that constitutional structure, he might not have bothered to destroy it from without, for it could have been adapted to his ultimate purposes as easily as he bent the constitution of the year VIII.*

*This constitution of the year VIII consisted of the simple and leading principles of Bonaparte's representative absolutism superimposed upon the complicated machinery of Sieyes' system of graded representation combined with divided authority, the same plan that had been rejected in 1795. Though this was the foundation it has been pointed out that "on fabrique dans le salon de Madame Bonaparte le projet qui est devenu la Constitution de l'an VIII". This constitution, with but minor rearrangements, an omission here, a change of name there, sufficed as the fundamental law, not only of the Consulate and the Empire in France, but for many other portions of Europe that fell under Napoleon's domination. His various constitutions, from Spain to Poland, from Holland to Naples, are all basically similar — prefabricated structures with false individual façades, to mask without impeding his unbridled will.*

## CHAPTER V

### THE CONSTITUTIONAL ABSOLUTISM OF THE YEAR VIII

"A CONSTITUTION is presented to you" proclaimed the Consuls of the republic to the people of France on December 15, 1799 (15 Frimaire an VIII).

"The constitution is founded on the true principles of representative government, on the sacred rights of property, equality and liberty. . . . Citizens, the revolution is fixed in the principles through which it began. It is finished." It was.

THE  
REVOLUTION  
FINISHED  
1799

The constitution of 1795 had not worked well. The acute division of power between the executive Directory and the legislative chambers had resulted in first the one and then the other violating the constitution in order to exercise effective control over the government of France. The constitution functioned regularly only until 1797, after which the Directory purged and subordinated the chambers and ruled virtually as a revolutionary government until the middle of 1799. It was then the turn of the legislature to humble the Directory and to seize the reins of government. Meanwhile, with her most brilliant general far away in Egypt and Palestine, the once irresistible armies of France were suffering reverse after reverse in Europe at the hands of the Second Coalition. When the two frigates containing the party of General Bonaparte arrived back from the east in the bay of Fréjus on October 8, 1799, and warned the inhabitants of the plague they were probably carrying from Alexandria, the latter cried out "We'd rather have the plague than the Austrians", and made them land without observing quarantine regulations. In Paris,



Bonaparte found sufficient disgruntled people, including two at least of the Directors, together with the presiding officers and a determined minority in both the Council of Ancients and the Five Hundred, who were willing to have despotism rather than the continuance of the existing *régime*. The *coup d'état* of November 9, 1799 (18 Brumaire an VIII), in the execution of which his brother Lucien (for the first and last time) overshadowed in adroitness and ruthlessness the illustrious Napoleon, made Bonaparte the master of France, and the country appeared to be his willing slave. Yet for her he brought out of Egypt not one plague but more than ten.

His rule lasted in France and over large areas of Europe beyond her borders for fifteen years, but the governmental machinery he used throughout this period with but minor alterations, was manufactured within a few days between November and December 1799. The constitution of December 13, 1799 (22 Frimaire an VIII), assembled in the salon of Madame Bonaparte on the frame of the discarded 1795 model for a constitution prepared for the Convention by Sieyès (now a Director and Bonaparte's confederate) sufficed as a basis both for the Consulate and for the Empire of Napoleon Bonaparte, the transition being affected by the *Sénatus-consultes organiques* of 1802 (16 Thermidor an X) and of 1804 (28 Floréal an XII). All three of these constitutional documents aimed consciously to secure and maintain the absolute power of Napoleon in fact, while preserving and paying verbal tribute to the forms of liberty. All three were submitted (the two latter in principle only) to general plebiscites of the people of France; all three accorded the universal manhood suffrage acclaimed in 1793 but withdrawn in 1795, though accompanied by elections to the central legislatures triply indirect; all three provided a supreme executive head (divided under the Consulate

OVERTHROW  
OF THE  
DIRECTORY

CONSTITU-  
TIONAL  
FOUNDATIONS  
OF CONSULATE  
AND EMPIRE

only in theory) and a triply divided legislature possessing no powers of initiation (the *Corps législatif* being allowed only to pass laws, the Tribunate — suppressed in 1807 — only to discuss them after proposal by the government, and the Senate — at first — only to annul them, in special circumstances); all three provide that ministers and a council of state shall be appointed by and act as agents of the executive head, and have no constitutional connection with the legislature; all three leave a loophole for direct legislation by the head of the state; all three impose the strictest administrative centralization of the country, providing (with the organic law of 28 Pluviôse an VIII supplying detailed organization) each department with a prefect, each *arrondissement* with a sub-prefect and each commune with a mayor, all assisted by councils and all appointed by or under the authority of the head of the state; all three prescribe a judiciary whose members are no longer elected but are appointed by the head of the state, nominally for life but actually (and after 1807 in particular) during his pleasure.

This tremendous concentration of actual and ultimate power in France into the hands of one man, meant that the quality of the government of the country was dependent upon him alone to an extent unprecedented, even under Louis XIV. The great Bourbon boasted that he was the state; the little Corsican was the state.

TREMENDOUS  
CONCENTRA-  
TION OF  
POWER

Under him France was fortunate in her misfortune, that though he wasted her manpower and squandered her resources in a never-ending quest for world domination, his orderly and practical mind supplemented his shallow constitutional system by far-reaching reforms at home, notably in the spheres of the legal system, the educational system and the ecclesiastical system of France. His legal codes, and particularly the Civil Code, blended with a few of his own prejudices most of what was best of the system of the *ancien régime* and many of the innovations of the

revolution, and were to exert a world-wide influence ; his schemes provided France with the structure of what remains to this day one of the most satisfactory educational systems in the world ; even his religious settlement, embodied in the *Concordat* of 26 Messidor an IX and the law of 18 Germinal an X, survived virtually unimpaired for a century. His constitutions were shams, the diaphanous

ADMINIS-  
TRATIVE  
REFORMS

draperies that inadequately shrouded an otherwise naked despotism, and their contributions to political science are negligible, but his administrative reforms, though they rested upon no popular sanction and paid less regard to the rights of man than to his nature and interests, often proved both salutary and permanent. Not without justice has he been called " the last and perhaps the most benevolent of the benevolent despots ".

Napoleon's constitutional ideas appear to have changed little throughout his public life. Bliss was it in that

NAPOLÉON'S  
CONSTITU-  
TIONAL IDEAS

dawn to be alive, and to be young was very heaven, but to the young Corsican the French Revolution was a heaven-sent opportunity rather than an inspiration. " Why do they not sweep away four or five hundred of them with the cannon ? " he exclaimed to Bourrienne as together they watched the mob storm into the Tuileries on June 20, 1792. Three years later he was in a position to follow a similar inclination, and the whiff of grapeshot of October 5, 1795 (13 Vendémiaire an III) was the result. Four years more passed and again he cheerfully made use of military force to turn yet another corner in the constitutional history of France, when on November 9, 1799 (18 Brumaire an VIII) his grenadiers chased all that was left of the Five Hundred out of the Orangery at St. Cloud, to be " lost to view and to history ".

Founded upon force and fraud, his system of government retained these as its two main props. In France a *coup d'état* was never again necessary for him, for on the

18 Brumaire he had captured the state, and he retained his hold even through the reverses of the Moscow campaign and Leipzig. Deposed at last, in 1814, by the Senate he had created for himself at home and banished to Elba by the coalition he had created against himself abroad, he departed without a struggle, and without a struggle he returned to his throne for the Hundred Days — a testimony to the benevolence of his despotism. It was only then

SIMPLE  
DESPOTIC  
PRINCIPLES

that he abandoned the simple despotic principles with which he had devised his instrument of government in 1799, and kept it sharp through fifteen hurrying years. And when he abandoned these principles, it was upon compulsion, a change of tactics rather than a change of heart. The trend between 1799 and 1814 had ever been in the direction of a more complete absolutism, not away from it. A consulate for ten years was extended to a consulate for twenty years, then to a consulate for life with the power to designate a successor, to become finally an empire with hereditary succession in Napoleon's own family; the Tribune, which discussed without passing, and the *Corps législatif*, which passed without discussing legislative proposals placed before them by the government, were reduced, by successive stages of attack

TREND  
INCREASINGLY  
DESPOTIC  
UP TO 1814

upon the independence of their personnel and the extent of their functions, to extinction in the case of the former, to a nullity in the state in the case of the latter; the universal manhood suffrage was tampered with to restrict the lists of people eligible for electoral assemblies to the most substantial taxpayers. The *Sénat conservateur*, a majority of its members nominated in the first instance by Bonaparte's creatures, the two retiring and the two incoming Directors (article 24, constitution of 1799), and its new members, chosen only from among persons previously approved by him, proved to be the best possible instrument for the furtherance of his dynastic ambitions and the

development of his despotic system. Devised in 1799 as a body simply to decide on the constitutionality of legislative proposals, it was gradually turned into a means of modifying the constitution, through *Sénatus-consultes* and *Sénatus-consultes organiques*, at the behest of Napoleon Bonaparte, and in a direction further and further away from "the true principles of representative government" and "the sacred rights of property, equality and liberty"

THE "SÉNAT  
CONSERVA-  
TEUR"

on which he had declared it to be founded.

From a *Sénat conservateur* it may be said to

have been turned into a *Sénat innovateur*, but

one of its innovations Napoleon had neither planned nor foreseen (if he had, the Senate might have gone the way of the Tribune), for on April 3, 1814, this hitherto subservient body issued a decree removing Napoleon Bonaparte from the throne of France and abolishing the hereditary succession in his family. Napoleon Bonaparte, it declared, had broken the social pact by which his constitutional monarchy existed, and had violated his coronation oath. The indictment that follows is reminiscent of the indictment of George III contained in the American Declaration of Independence.

Three days later the Senate, transforming itself into a constituent body, published a liberal constitution in outline form, calling the Bourbons back to the throne of France as constitutional monarchs, to share the exercise of sovereign power with the representatives of the people. The creature of Frankenstein had indeed run amuck, and had tumbled down the whole sham façade of Bonapartist constitutionalism. Napoleon, returning from Elba a year later, wisely left it in the dust.

## CHAPTER VI

### THE NAPOLEONIC SPHERE OF INFLUENCE

No sooner had revolutionary and republican France begun to conquer and convert Europe, than Napoleon Bonaparte conquered the revolution and converted the republic (using the Consulate as his stepping-stone) into an hereditary empire. His model, ancient Rome, was an illustrious one, and he improved upon it according to his lights, by concentrating the complete cycle into less than five years. In October 1799 he returned from Egypt ; by May, 1804 he was Emperor.

Rapidly making good the reverses which France had suffered since Campo Formio, he was able, by humiliating the Emperor at Lunéville and by temporizing with Britain at Amiens, to consolidate his hold upon the ring of satellite states which had previously recognized the France of 1795 as the centre of their universe. He found them in 1799 each a republic one and indivisible with its reflection of the Directory and its version of the Ancients and the Five Hundred. He did not suffer them for long to continue to remind him of the fog he had dispelled at St. Cloud on that memorable morning of 18 Brumaire.

From republics one and indivisible, each possessing a great measure of actual and complete theoretical independence of France, he converted them into republics dependent and variable, in which the nominal head of the state was his proconsul, and then (where he did not annex them entirely to the French Empire) turned them into monarchies, Bonapartist and subservient. Meanwhile he was creating and widening an outer ring of client states which were also

THE  
SATELLITE  
STATES

CONVERSION  
INTO  
MONARCHIES

bidden to sup below the salt at the table of Bonapartist constitutionalism.

Step by step the satellite states thus dogged the footsteps of France from Directory to Consulate and from Consulate to Empire. Only Switzerland, of all these states, escaped the ultimate humiliation of a Bonapartist dynasty. With calculated magnanimity he permitted her to become and remain a dependent federal republic in a ring of dependent unitary monarchies.

The people of the Helvetic republic, which had received its directorial constitution in 1798, chafed against the unaccustomed centralization which French ideology had forced upon them, and the cantons seethed with righteous

ONLY  
SWITZERLAND  
REMAINS  
REPUBLICAN

indignation ripening into open revolt. To strengthen the government, Bonaparte caused the Helvetic Directory to be replaced early in 1800 by an executive committee with wide powers. Then followed an amazing display of haggling between the First Consul and the Swiss, during which four separate draft constitutions for the Helvetic republic were prepared within the space of a twelvemonth, between May 1801 and May 1802. The draft of May 29, 1801, representing the First Consul's views, was so altered when it reached Switzerland that the constitution which emerged from the Assembly at Berne on October 24, 1801, proved unacceptable to him, and pressure from the French authorities produced a reconsideration of the original draft, leading to the adoption of a new constitution on February 27, 1802. This new "French" constitution, though making some minor concessions to the representations of the Swiss,

THE  
HELVETIC  
REPUBLIC IN  
TRANSITION

remained unpalatable to them, and an assembly of notables drew up yet another constitution on May 20, 1801. Though it left the Helvetic republic a unitary state, it was significant that this fact was not recorded in the opening words of the constitution (as had been the practice

in each of the previous Helvetic constitutions), but kept back until article 2, while the cantons are listed in careful alphabetical order and no capital is specifically designated (as Berne had been since 1798). A "republic one and indivisible" obviously would not work in Switzerland.

Exasperated, the First Consul, instead of withdrawing the French troops from Switzerland, as he had promised to do directly an agreed constitution could be adopted, completely reoccupied the country and prevented this fourth constitution of a twelvemonth from going into force. Nor had it satisfied the particularists in the cantons.

The Gordian knot was cut by the First Consul, just three months before he became Emperor of the French, dictating a fundamental law for the Helvetic republic and for each of the cantons, and these twenty miniature constitutions lasted until the allies drove the French out of Switzerland in 1814. This was the famous Act of Mediation of February 19, 1803, in which he abandoned completely

THE ACT OF  
MEDIATION,  
1803

the task which he had inherited from the Directory of trying to make a unitary state of Switzerland. But the Act of Mediation did not revive the old confederation in all its looseness and with all its variations in the status of members. It created a truly federal state, dividing sovereignty between the cantons and the central power somewhat in the way it had been divided in the United States in 1787. In accordance with the best federal theory the pre-existence of the cantons was admitted by giving each its constitution (sections 1-19) before the federal authority was mentioned (section 20). The cantons were made equal members of the federation and six new cantons were added to the original Helvetic republic.

This singular concession to deep-seated traditions of cantonal autonomy (though as a piece of Napoleonic statecraft it was less a concession than a decision to divide and



rule) was not made without the taking by the First Consul, of his pound of flesh. The canton of the Valais, of vital strategic importance as containing the Simplon Pass, was separated from the Helvetic republic as an independent state. Later it was annexed as a department of France.

The Swiss people did not take kindly to the Act of Mediation. By setting up a federal state Napoleon gave them a pattern for the future far beyond their existing desires, and in 1815 Switzerland, his domination removed, reverted cheerfully to the status of a mere league or confederacy of sovereign cantons. Federalism was rejected almost as decisively as had been the republic one and indivisible.

Switzerland had been a republic for centuries before the French Revolution, and a republic she remained through all the vicissitudes of the ensuing quarter-century, but the United Provinces of the Netherlands could only by courtesy be called a republic during the hundred years preceding 1789. The impact of the French Revolution in the Provinces had the effect of momentarily rehabilitating republican institutions by removing the Orangist pressure upon them, but it was only a temporary reprieve.

The trouble between the " Patriots " and the Orangists had led to a Prussian invasion of the United Netherlands in 1787 in favour of the Stadtholder, but Pichegru and the hard winter of 1795 removed the confederation of the United Netherlands and its Stadtholder from the annals of Europe. The Southern or Austrian Netherlands, whose bid for liberty had also just preceded the French Revolution, were annexed and became departments of France, but the Northern Provinces were allowed to set up a Batavian republic, one and indivisible. A constitution was slowly elaborated and reflected the triumph of the French

FRENCH  
REVOLUTION  
AND THE  
UNITED  
NETHERLANDS

THE  
BATAVIAN  
REPUBLIC

party in the country, by appearing finally, in 1798, with a Directory of five (*Staatsbevinde*), a Council of sixty, and a Council of thirty, and a strictly centralized *régime*, the old provinces making way for eight departments.

The First Consul, in 1801, increased the number of the Directory to twelve, and replaced the bicameral legislature by a single body of 35 members, but the considerable control he was able to exercise over the Batavian republic under the Constitution of 1801 did not satisfy him when

BATAVIAN  
CONSTITU-  
TIONS OF  
1798, 1801  
AND 1805

he became Emperor, so in 1805 the Batavian republic received its third and last constitution. The ancient office of Grand Pensionary was revived to provide Napoleon with a native Viceroy in the republic, but the excellent Schimmelpennink could not cope with the economic antagonisms of the emperor and the Dutch, and Napoleon, only a year later, decided to appoint a more reliable puppet by making his brother Louis king of Holland. The Batavian republic thus ended its single decade of existence. But Louis, "unwilling king of an unwilling people", failed sufficiently to prostrate the interests of the Dutch or to efface his own already negative personality before the inexorable demands

BONAPARTIST  
KINGDOM OF  
HOLLAND,  
1805-1810

of Napoleonic policy, and he went the way of Schimmelpennink in 1810. The Northern Netherlands now joined their Southern neighbours as departments of the French Empire, and the riddle of the Scheldt was thus solved by making it a French river. And so it remained until the Empire fell. Few of his dependencies received less consideration from Napoleon than the Netherlands, and unlike Italy they had never known him as a liberator.

The man of destiny, who took command in 1796 of the army of Italy at the age of twenty-seven, had very soon committed the Directory to the paternity of a series of republics which brought to the peninsula from Alps to toe, always excepting Venice, the new *régime* of liberty,

equality and resistance to oppression. To French policy and French ideas the Alps, like the Pyrenees a century before, had for the moment ceased to exist, and Italy became five political expressions (or six if the tiny state of Lucca be included) of the France of 1795, as General Bonaparte understood it.

ITALY  
BECOMES  
SIX POLITICAL  
EXPRESSIONS

The Second Coalition played havoc with Napoleon's Italian republics, and before the end of 1799 all except the Ligurian had been overwhelmed, while even there Masséna was on the defensive in Genoa. Bonaparte's second conquest of Italy, this time as master instead of as servant of France, resulted in the saving of the Ligurian and the revival of the Cisalpine republic, but Naples remained as a Bourbon kingdom. The Cispadane republic did not reappear and Piedmont was annexed to France and divided into departments. The great dream of a united Italy, a federation of free republics under the disinterested protection of France, had been shaken by the handing over of Venice to Austria in 1797; now it was shattered completely and was to remain shattered for over half a century. Napoleon Bonaparte, for all his Italian blood, showed himself to Italy as but another Charles VIII. Once again "Ad ognuno puzza questo barbaro dominio".

The second departure from the republican trend in Italy came in 1801 when the Grand Duchy of Tuscany became, not the Etrurian republic but the kingdom of Etruria (to provide a throne for the hereditary prince of Parma, whose own territory had been annexed by France). The kingdom of Etruria was itself annexed in 1808.

ITALY'S  
REPUBLICS  
LIQUIDATED

The Cisalpine republic, most substantial of all the Italian satellites of France, was not allowed to retain much longer its free institutions under the constitution of 1797. In 1802 the First Consul changed it into the subservient Italian republic, giving it a new constitution

which, though retaining an elected legislature, enabled him, as President of the new republic, to control it (acting through a native vice-president on the spot) as effectively as he was in control of France herself. This fresh constitution was as autocratic in tendency as was the French after the *Sénatus-consultes* of 1802. At the same time the Luccan and Ligurian republics became similarly subservient.

It was only to be expected that, when the French empire was set up in 1804, the Italian republic should become the kingdom of Italy, with Napoleon as sovereign and his stepson Eugène Beauharnais as viceroy, while France herself was brought into direct contiguity with the new kingdom by the annexation of the Ligurian republic in the following year. This violation of the natural frontier of the Alps was to lead only to wider annexations, of the kingdom of Etruria, of Rome and the Patrimony of St. Peter (both to the French Empire) and of the Papal provinces (to the kingdom of Italy). Meanwhile the Third Coalition lost the mainland of the kingdom of Naples to Napoleon, who put his brother Joseph on the throne there in 1806, replacing him in 1808 by Joachim Murat, a brother-in-law, when Joseph was called to succeed yet another Bourbon in Spain. One of Joseph's last acts as king of Naples was to give a constitution to the country, which Napoleon himself guaranteed on June 20, 1808, and which remained nominally in force until the end of the reign of Murat. Modelled in the main on the imperial constitution, it contained a full measure of Bonapartist hocus-pocus. A farcical "National Parliament" consisted of five classes of members — ecclesiastics, nobles and scholars, who were life-members, and substantial property-owners and merchants, who were chosen by their fellows afresh for each parliament. This body was required to meet at least once every three years; its proceedings were secret, and

BONAPARTIST  
KINGDOM OF  
ITALY, 1804

BONAPARTIST  
KINGDOM OF  
NAPLES, 1806

reports were not permitted to be printed ; it was not allowed to discuss certain specified reserved subjects. Murat's tendency to disregard this constitution can hardly be regarded as an onslaught upon popular government.

No satellite republic was set up by France on German territory. The left bank of the Rhine was conquered, annexed and divided into departments of France by 1795, but it was not until the Consulate that any governmental remedy short of outright annexation was judged expedient for any part of Germany that fell within the French sphere of influence. Then, in 1803, through the *Reichsdeputationshauptschluss*, the First Consul, by extensive mediatisations, giving nearly all the free towns and ecclesiastical states as well as the remaining knightly *enclaves* to the more important princes and rulers, reduced the number of sovereignties east of the Rhine to a more manageable number. By 1806 his management began to produce dividends. For Germany the year which saw the extinction of the Holy Roman Empire and the foundation of the Confederation of the Rhine is one of the great dividing lines in her history.

Germany at the end of the eighteenth century was seething with intellectual enlightenment, but barren of ideas for her political regeneration ; her culture was that of the Polis and flourished in the *Kleinstaat* and the free city ; Frederick the Great had despised as intellectually barbarian the well-drilled Prussia of his father's moulding over which he ruled ; Austria and the Empire, despite Maria Theresa and Joseph II, resisted the *Aufklärung* with an impermeability unrivalled in Germany. Such was the region upon which burst all the disruptive force of the French Revolution and all the eruptive vigour of Napoleon Bonaparte. A people so unmindful of the chaos of its political institutions could resist neither of these.

ANNEXATION  
AND  
MEDIATIZA-  
TION IN  
GERMANY

POLITICAL  
IMPOTENCE  
OF GERMANY

Napoleon once declared that if the Holy Roman Empire had not existed it would have been necessary to create it, but when in 1806 he found it an obstacle to his schemes, he brushed it contemptuously aside. It expired without protest, nor can history lament its passing. Austria had by then discovered its hollowness even as a dynastic tool, and the Diet at Ratisbon, which could attract the representatives of only fourteen princes out of a hundred, and of four free towns out of fifty-one in 1778, rightly deserved Napoleon's scorn as nothing more than a miserable monkey-house.

HOLY ROMAN  
EMPIRE  
EXPIRES

Napoleon's system in Germany spread not only his own power, but the social and political ideas of the French Revolution far beyond the Rhine. His policy for Germany was dictated by no other considerations than Bonapartist reasons of state ; his drive through Germany's constitutional maze was based upon dynasticism and administrative expediency ; yet he brought a simplification to Germany's problems such as could not conceivably at that period have been achieved from within. Broadly, his policy was to isolate Austria, to render Prussia

NAPOLEON'S  
SIMPLIFICA-  
TION OF  
GERMANY'S  
PROBLEMS

permanently impotent and pliable, to make treaties with the smaller princes and to build up the secondary states into a barrier, a third Germany, to insulate the two leading powers. Advised by Talleyrand, he met the problem of northern and southern Germany in different ways. Prussia and Austria having both been driven back far from the Rhine, the north was carved into new Bonapartist states, while the south was left to its native houses, provided that they became the creatures of French policy.

Once he had decided to impose political reorganization upon Germany, Napoleon at first wavered from plan to plan. Then, with characteristic and lightning rapidity he completed his plans, and, having made adequate military preparation east of the Rhine, gave the astonished German envoys at Paris twenty-four hours in which to

accept the treaty of the Confederation of the Rhine, or to risk mediatization for the states they represented as the price of refusal. Fifteen states immediately adhered to the new arrangement.

As a piece of clear-headed statecraft the constitution of the Confederation of the Rhine cannot but command admiration, despite the characteristic insincerity of its provisions. "It was dictated", says Treitschke, "by a thorough knowledge of the German estate of princes." The fifteen princes, by joining the new Confederation, severed themselves for ever from the Holy Roman Empire (article 1); a hollow diet of two colleges was devised to meet at Frankfurt am Main (article 9) and to prepare a fundamental statute for the Confederation (article 11), which of course (for this was a Bonapartist constitution) it never did; the princes had all to contribute fixed contingents of troops to any war in which France or the Confederation was involved (articles 35-38); each member of the Confederation received plunder in the shape of mediatized lands (articles 17-26), and a thorough simplification of boundaries and of territories within the frontiers of the Confederation was carried out (articles 13-16). Here Napoleon builded better than he either knew or cared. These rearrangements were carried out merely to increase his hold upon western and central Germany, but for Germany herself they were later to prove an untold blessing. "By these masterly provisions", claims Fisher, "the political map of Germany was simplified, and more was done for the cause of good government in the valleys of the Danube, the Neckar and the Main than had been effected by all the policies of the eighteenth century." The patchwork map of the old Germany, with its *enclaves* and its sovereign territories often but a few miles square, was an eyesore to an orderly mind such as was Napoleon's, and he re-drew it with a thoroughness before which even the principle of legitimism was to stand powerless.

CONFEDERA-  
TION OF THE  
RHINE

By framing (in every sense) this Confederation, making himself its official "protector" (article 12) and its prince primate his nominee, Napoleon completed a process he had begun at Lunéville in 1801, a process of decimation, rationalization and Gallicization of the remaining independent states of western Germany. Austerlitz and Jena placed both Austria and Prussia beyond effective protest, and made possible also a rapid growth of the Confederation of the Rhine (as provided for in article 39) not only to north Germany, but to the Elbe, the Oder and the Vistula, in the years succeeding 1806. In 1807 Saxony, Oldenburg and Mecklenburg were included; in 1808 the Bonapartist kingdom of Westphalia (which had been presented with Jerome Bonaparte and a stock constitution in 1807) was added; in 1809 the Grand Duchy of Warsaw, to the chagrin of Poland's patriots, was made to adhere. It was not beyond Napoleon's imagination to have stretched the Confederation of the Rhine to the Neva had the fortunes of 1812 been different. Then indeed might his "grand système fédératif européen" have truly existed.

EXPANSION  
OF THE CON-  
FEDERATION

The era of Napoleon changed the forces and destinies of Germany in many ways. However much of his work was undone at Vienna, there was much that nothing could undo. He had brought to political life a people over which generations of its own patriots had despaired; he had galvanized Prussia, cut away the dead weight of the imperial crown from Austria, sent the efficiency of French administration into the whole of western Germany, and simplified her state system to an extent almost unbelievable. After Napoleon had finished with her, Germany may not already have been a nation, but she had become much more than a geographical expression.

GERMANY NO  
LONGER A  
GEOGRAPHICAL  
EXPRESSION

Poland had far more to hope for from Napoleon, but far less to thank him for than had Germany. On October 10, 1795, just five days after the whiff of grapeshot of 13



Vendémiaire from which Napoleon's great fortunes date, the once great state of Poland had come to her final misfortune. The name "Poland" lived on only as a theoretical expression, and for many years was by agreement never used in the state papers of Prussia, Austria and Russia. Napoleon, who might with impunity have done something for the Poles in the treaties of 1797 and 1801, and who did actually toy with the idea of reviving the kingdom of Poland in 1807, found reasons for keeping that name off the map of Europe, but under another name, the Grand Duchy of Warsaw, he did give separate though short and dependent political existence to what had once been part of the ancient Polish state.

NAPOLÉON  
AND THE  
POLES

Long before the partitions of the eighteenth century the political institutions of Poland had diverged so far from their promising beginnings that they became the Augean stables of political theorists and the standing butt of practical politicians of all countries. The celebrated *liberum veto* "that would have been thought impracticable had it never existed", and that made "every individual of the nobility and gentry . . . an Estate of the Kingdom", aroused alike the scorn of Voltaire, the reforming zeal of Rousseau and the warning finger of Alexander Hamilton, before it disappeared from the face of Europe, dragging the Polish state and monarchy with it.

THE ANCIENT  
POLISH  
CONSTITUTION

The many attempts made to reform the Polish constitution during the eighteenth century were all defeated by internal faction or by the interests of Poland's more powerful neighbours. But the institutional revolution initiated by the Four Years' Diet in 1788 — a revolution no less interesting at the outset than that which started in France a few months later and stole from it the spotlight of history — came too late to save Poland either from herself or from her aggressors. "The memorable constitution" of the

ABORTIVE  
CONSTITUTION  
OF 1791

third of May, 1791, in which the revolution against the *ancien régime* in Poland culminated, was never put into operation. "The new constitution" wrote Edmund Burke, in December, 1791 — after praising its theoretical excellence — "only serves to supply that restless people with new means, at least new modes, of cherishing their turbulent disposition." It would have replaced the weak elective monarchy and the *liberum veto* by a stronger hereditary monarchy. The privileges of the nobility and gentry would not have been abolished, but the burgesses would have received certain rights and the peasants would have been protected and gradually freed from serfdom. The king would, in the exercise of his executive power, have been advised by a cabinet responsible to the legislature, which would have remained bicameral, but on a reformed basis. The danger of renewed constitutional stultification would have been met by the calling of a fresh constituent diet every twenty-five years.

This constitution, framed at the same time as the French Constitution of 1791, was little influenced by contemporary events in France. It owed much to Montesquieu, and his *exposé* of the British constitution; it was a product of the *Aufklärung*, not of the years of revolution. With all its faults it gave to the Poles during the century and a quarter of their bondage a tradition of constitutional and enlightened government, a symbol of what might have been and of what might be again.

Napoleon, with the full approval of that romantic realist Alexander I of Russia, created the Grand Duchy of Warsaw in 1807 for his ally the King of Saxony (whose dynasty was to have been given the new hereditary crown of Poland following the death of King Stanislaus, under the constitution of 1791). He initiated a constitutional *régime* on the model of his own imperial system in France, and made the Grand Duchy a member of the Confederation of the Rhine. Representative institutions were provided, but

THE GRAND  
DUCHY OF  
WARSAW, 1807

all the characteristic Bonapartist bars to popular control, were also present — legislative bodies unable to initiate or to discuss except in sectional committees ; a senate appointed by the king and with life tenure ; a lower house elected by special classes of substantial citizens only ; strict administrative centralization under appointed prefects, sub-prefects and mayors. The “ Liberty ” that Napoleon in the final section of the constitution of 1807 (article 89) declared he was giving to the Poles was handed out in very small parcels, with many strings attached, but though the function of this constitution, as of so many others, was “ merely to give the appearance of a national sanction to Napoleon’s constant demands for recruits and subsidies ”, it also brought to the Grand Duchy (which included the bulk of Prussian Poland, together with Cracow and Eastern Galicia after 1809) the equalitarian legal system of the French Revolution to which Napoleon continued to adhere. This meant not only religious toleration and the abolition of serfdom, but also, as a permanent boon, the blessings of the *Code Napoléon* (adopted in accordance with article 69 of the constitution).

The constitution of the Grand Duchy of Warsaw remained in force under five years, and the retreat from Moscow, which blotted it out, also prepared the way for Alexander’s “ Congress kingdom ” of Poland to be brought forth with much labour by the Congress of Vienna in 1815. The Constitution of November 1815 fulfilled Alexander’s promise to the Powers of “ a representation and national institutions ” for Poland, but though it was on paper a great advance (when compared with Napoleon’s devices) in the direction of representative self-government on a national basis, only the Polish nobility and gentry had any part in government, and the control of Russia over the policy of the kingdom was safeguarded by the appointment of a viceroy and a commander-in-chief of the Polish army by Alexander himself.

THE CONGRESS  
KINGDOM OF  
POLAND, 1815

Disliked with unusual unanimity, but for most varying reasons, by the Poles, the Russians, the Emperor Alexander and the Vienna Powers, this constitution may be said never to have been given a chance by any of them to show how bad or how good it really was. It barely survived Alexander himself, only to be swept aside by his successor — as Castlereagh had foretold — in favour of an “Organic Statute” which, while it preserved certain distinguishing rights for the Poles, incorporated the kingdom as an integral part of the Russian Empire and replaced the elected Diet by an appointed council of state. In 1847 the Organic Statute disappeared too, and the Congress kingdom lost its identity and all its remaining rights, to become the Russian province of Poland.

The story of Bonapartist constitutionalism was very much the same everywhere. Republics one and indivisible on the model of 1795 were succeeded by republics dependent and variable on the model of 1799, and these in their turn gave place to monarchies consanguinous and subservient on the model of 1802-4. Joseph Bonaparte became king in Naples and then in Spain, Louis in Holland, Jerome in Westphalia, Joachim Murat in Naples, Eugène Beauharnais viceroy in the kingdom of Italy, and then, as the supply of dependable relatives began to run out, the faithful king of Saxony was made Grand Duke of Warsaw. Only Switzerland survived at the second status into Napoleon's third stage of development. Everywhere the shadow of representative government and popular sovereignty was conceded and their substance denied. Whatever the local variation on the theme of the constitution of the year VIII, whatever permutations and combinations of the institutions of the Consulate and Empire were indulged in, the result was always the same — constitutional absolutism. Nor did this involve a contradiction in terms, for though Napoleon Bonaparte

GENERAL  
PATTERN OF  
BONAPARTIST  
CONSTITU-  
TIONALISM

never gave or intended anywhere to give self-government, he did give equality before the law, and what is just as important, it was good law. Herein indeed, if nowhere else, was he the heir to the revolution.

In all that greater part of Europe which may be described as Napoleon Bonaparte's sphere of influence, only two constitutions introducing a new *régime* were put into operation while he was in power in France that were not to a greater or a lesser extent dictated by him, and that did not bear his characteristic stamp. These were the Spanish and Sicilian constitutions of 1812.

When he sent his brother Joseph from the throne of Naples to that of Spain in 1808, Napoleon sent with him a constitution for Spain of the familiar type. Joseph was to have nine ministers and a council of state, there was to be a senate appointed for life, and a *Cortes* of three estates to which were added deputies from the colonies. Freedom of the press, the abolition of torture and the Inquisition, as well as of feudal privileges, and a new legal system, were promised. The national rising of the Spaniards against the rule of Joseph and of Napoleon was soon to engulf this constitution, and the insurgent *Cortes* of Cadiz produced its counter-constitution of 1812. Bonapartist constitutionalism in Spain received the *espada* almost before it had entered the ring.

In Sicily it did not even enter the ring. When the Bourbons were driven by Napoleon from Naples for a second time, they were able to retain Sicily with the aid of a British army of occupation.

SICILY  
REPELS IT

During the British occupation, between 1808 and 1814, the struggle between the monarchy and the estates of Sicily placed the British commanders virtually in control of the administration of the island. Their reforms, involving the disappearance of the *ancien régime*, were comparable in extent to those of Joseph and Murat

on the mainland, and the constitution drawn up by the estates in 1812 was not without justice called the "British" constitution. Like the Spanish (which was also drawn up in territory under British occupation) it ran counter to all the trends of Bonapartist absolutism. But it also ran counter to the traditions of Bourbon absolutism, and lapsed in 1814 (again like the Spanish) when the British withdrew. Though promulgated in defiance of all that Napoleon stood for, these two constitutions were, by a strange irony, both brought down by his fall.

## CHAPTER VII

### POSTSCRIPT TO BONAPARTISM — THE NAPOLEONIC IDEA

It was not until the feverish hundred days of Napoleon's last phase of power that he produced his first and only genuine constitution, genuine in the sense THE "ACTE ADDITIONNEL" that it did not take away by stealth with one hand what it gave openly with the other, genuine in that it was not merely a mask for the face of absolutism.

The *Acte additionnel aux Constitutions de l'Empire*, as Napoleon insisted on calling it, though in spirit it broke with them completely, was forced from him by the pressure of events. Published on April 22, 1815, just five weeks after his return from Elba, it was an appeal to the French people, a bid for their support such as he had not previously found it necessary to make. In 1799, in 1802 and in 1804 the people of France had been asked by plebiscite to ratify his constitutional changes, but the alternative was chaos. In 1815 they had been presented during the year since his first abdication with two distinct forms of government alternative to his own. By the Senate constitution of April 6, 1814, a sovereign people was, of its own free will, setting up a strictly limited ITS COMPETITORS monarchy, leaving to the king executive functions only. By the Constitutional Charter of June 4, 1814, an absolute monarch, voluntarily and by the free exercise of his royal authority, was conceding to his subjects the realities of representative government. Both of these were advances upon the constitutional absolutism of the Consulate and the Empire; both of them united in recognizing the Bourbon and not the Bonaparte dynasty as head of the French state.

• The Charter had swept aside the Senate constitution as a practically possible form of government for the Bourbon restoration. It was, therefore, principally against the former that Napoleon was forced to make his bid. "Louis XVIII played the *Charte*; Napoleon doubled and played the *Acte additionnel*." But though this time he had no aces up his sleeve, he still remained unable to play straight. It is significant that while the preamble to Louis' Charter is much more absolutist in its assertions than is the body of the constitution in its provisions, the preamble to Napoleon's *Acte additionnel* is much more liberal in its professions than is the rest of the document in its concessions.

It is also significant commentary upon the changed status of Napoleon's power and self-confidence in 1815 as contrasted with 1799, that whereas in 1799 he had taken Sieyes' constitutional plan and scooped out its body and heart, using only the husk to give liberal and popular cover to the machinery of absolutism, in 1815 he accepted the draft constitution prepared by Benjamin Constant, a known and avowed liberal (drawn up, admittedly, with an eye to what the emperor, in his extremity, would be able to stomach), virtually without amendment. Even the hereditary peerage, to which Napoleon objected strongly, remained part of the *Acte additionnel*. His personal stamp is confined to the title (on which he insisted without deceiving even himself) and to the preamble (with which, even if he did not deceive himself, he succeeded in deceiving a portion of posterity).

The preamble argues that over a period of fifteen years he had been seeking to perfect constitutional forms in accordance with the needs and desires of the people of France, but that, in pursuing his aim of founding a great European federal system, he had found it necessary to adjourn the establishment of certain internal institutions "plus

BENJAMIN  
CONSTANT'S  
DRAFT

NAPOLÉON'S  
PREAMBLE



spécialement destinées à protéger la liberté des citoyens ", His aim being now to maintain peace, he desired to make the constitutions of the empire conform " aux vœux et aux besoins nationaux ", for which reason he was giving to the representative system " toute son extension " and submitting his proposals to the vote of the whole people.

In the body of the constitution we find the emperor retaining the executive power without check (though ministers are allowed to be members of the legislature, they need not be), but sharing the legislative function with the two chambers (article 2). The dice are still loaded in favour of the emperor in the legislative sphere because the government alone has the right to initiate legislation, while, though the two houses can submit amendments, they cannot insist upon them (article 23) and must, if the government rejects these, simply accept or reject a law in the form originally proposed. The power of dissolution (article 21) and the unlimited right to create new peers (article 3), gives the government valuable weapons against a recalcitrant legislature, which are hardly balanced by such elements of popular parliamentary authority as the election of its presiding officer by the Chamber of Deputies itself (article 9), the requirement that a new legislature shall assemble within six months of a dissolution (article 21), the reservation to the Chamber of Deputies of the right to propose taxes, loans and levies of men (article 36) and the forbidding of meetings of the House of Peers when the Chamber of Deputies is not in session (article 22).

The franchise is not broadened, and the system of the empire is little changed, except for giving special representation to industrial, manufacturing and commercial interests by allowing the departmental electoral colleges to choose representatives from lists submitted by chambers of commerce (article 33). The independence of the

EXECUTIVE  
AND  
LEGISLATIVE  
SPHERES

MINOR  
FRANCHISE  
AND JUDICIAL  
CHANGES

judicial system is made more real by judicial appointments being for life from the moment of nomination (article 51), instead of for life subject to a probationary period of five years.

An innovation is the addition of a declaration of the rights of citizens (section VI of the *Acte*), in which equality before the law is mentioned first, followed by liberty of worship, the inviolability of property, the prohibition of a censorship (against which the Senate had protested so vigorously in 1814 in its decree deposing Napoleon) and the right of petition, while declarations of a state of siege are to be confined to cases of invasion and civil commotion and to be confirmed by the legislature. Finally it is declared that no restoration of the Bourbon dynasty, or of the feudal nobility, is possible, and the sales of the national domain are stated to be irrevocable.

A  
DECLARATION  
OF RIGHTS  
INCLUDED

The *Acte additionnel* was accepted overwhelmingly in a popular plebiscite, with a million and a half votes in its favour and only five thousand against, but the battle of Waterloo a few weeks later tipped the balance in favour of the five thousand objectors. Napoleon went to St. Helena and the *Acte additionnel* never went into operation.

"In a hundred days", said Metternich, "Bonaparte undid the work of the fourteen years during which he had been in power. He let loose the revolution which he had suppressed in France." But the tentative radicalism of the *Acte additionnel* can hardly be said to have amounted to this. Indeed, we see in it Bonaparte the would-be legitimist rather than Bonaparte the *sans-culotte*. In it he borrowed much from Louis XVIII's Charter of 1814; in it he sought to perpetuate the Bonaparte succession, and to exclude for ever the Bourbon dynasty by identifying it with the *ancien régime*; in it he conjured up a great European federation with himself, the liberal emperor, as king-pin.

WOULD-BE  
LEGITIMISM  
OF THE  
"ACTE"

The *Acte additionnel* did not serve to prolong the first empire, but thirty years after Napoleon's death its memory was not without value in the foundation of an *Empire additionnel*. Louis Napoleon Bonaparte, nephew and step-grandson of the greater Napoleon, came to position

THE "ACTE"  
AND THE  
SECOND  
EMPIRE

and power in France by ways more devious and less spectacular than did the latter. The apprenticeship of the *Carbonari* had to serve for that of Toulon, the fiascos of

Boulogne and Strasbourg for the whiff of grapeshot and the bridge of Lodi, the "University of Ham" for the researches of the Egyptian campaign; but they led, nevertheless, aided by an illustrious name and *Les Idées napoléoniennes*, to what an acute contemporary observer called, with justice, "The 18 Brumaire of Louis Napoleon". Paying Napoleon I that sincere flattery which only perhaps a sub-filial piety could inspire, Louis Napoleon (despite a name which hinted at a compromise between two dynasties) was able to imitate the phases of the Consulate and the Empire with amazing verisimilitude. The *coup d'état* of 1851 follows closely that of Brumaire; the constitution of 1852 resembles that of the year VIII; the empire of 1852-60 that of 1804-14; the empire of 1860-70 that of 1815. The constitution of 1870 may be called the *Acte additionnel* of the Second Empire, and Sedan was its Waterloo.

The circumstances were, of course, very different. Louis Napoleon was freely elected President of the

FIRST AND  
SECOND  
EMPIRES  
CONTRASTED

French Republic by direct universal franchise under the constitution of 1848, on December 10, 1848, and his illegal assumption of extra-constitutional power did not

come until December 2, 1851, three years later. On the other hand, the period corresponding to the Consulate lasted barely a year, the imperial rank being restored on December 10, 1852 (the day on which Louis Napoleon's four-year term of office would have expired, and under

the constitution of 1848 he would not have been immediately re-eligible). The "authoritarian empire", under which no concessions were made in the direction of a more liberal *régime*, was only maintained by Napoleon III until 1860, whereas Napoleon I had maintained his authoritarian empire until his first abdication in 1814. The decade of the sixties saw a series of concessions, beginning with the decree of November 24, 1860 (which initiated the return to parliamentary government) and culminating in the restoration of the liberty of the press and the right of public meeting (laws of May 11 and June 6, 1868). A complete constitutional revision, giving the initiative in legislation to the chambers as well as to the emperor and requiring the consent of both houses for the passing of laws (*Sénatus-consulte fixant la constitution de l'Empire*, May 21, 1870), and new laws on local government, allowing the *conseils généraux* to elect their own presidents, and the mayors to be chosen from the members of the municipal councils (laws of July 22 and 23, 1870) followed. Punctuating his major constitutional changes by plebiscites, as had his predecessor, Napoleon III obtained 7,350,000 votes for his constitution of 1870, but over a million and a half were against it. Though this *Acte additionnel* of the Second Empire received such clear ratification, and though article 1 stated "The constitution recognizes, confirms and guarantees the great principles which were proclaimed in 1789 and which form the basis of the public law of the French people", Nemesis came almost as quickly to this second *Acte additionnel* as to the first. On September 4, 1870, the *Corps législatif* (not the Senate this time) re-established the republic, set up an emergency government of national defence, and reminded citizens of the crisis of 1792. To the last the Second Empire was the shadow of the first.



## PART III

### LEGITIMIST CONSTITUTIONS— THE CONDESCENDED STATE

## *Legitimist Constitutions — The Condescended State*

*The principle of legitimism, brilliantly conceived by Talleyrand as a device for salving for France the maximum possible in prestige and territory from the wreckage of the revolutionary and Napoleonic era, was accepted by the powers at the Congress of Vienna, and not only preserved for France the frontiers of 1790, but also provided a pattern for the rebuilding of Europe after two decades of war.*

*In the sphere of government a logical acceptance of the principle would have implied the complete restoration of the ancien régime, but for many reasons it was not found practicable or expedient to adhere ruthlessly to its formula. Instead, a compromise was worked out almost everywhere (even in the Papal States and Naples, though the lamp-posts were uprooted, enlightened rule had left ideas in peoples' heads that could not easily be put out) and this compromise tended to bring with it either the existence or the promise of forms of government that were ascertainable in the shape of written constitutions. The written constitution conquered most of the world in this era of restoration, but it was a constitution conceded and revocable, the condescension of a prince to his subjects, not the freely adopted instrument of a sovereign people. The representative estates of the ancien régime, resting upon tradition and custom, tended to disappear, and legislative bodies, elected on a narrow basis and possessing strictly limited powers, to take their place. The prince reserved all sovereignty to himself, but the great revolution had also been a great warning. Legitimist constitutionalism was not liberal but it was at least, in most cases, genuine. Monarchy, though technically not yet limited, recognized boundaries beyond which it was wise not normally to step. Above all, though the liberty at which the revolution had aimed was ignored, the equality it had brought and Napoleon had maintained, was only half-heartedly assailed.*

## CHAPTER VIII

### LEGITIMISM IN THEORY AND PRACTICE

LEGITIMISM was seized upon, though perhaps not originally conceived as such, to serve as an anti-revolutionary bulwark. As worked out in the various states of Europe — for it was not found possible to extend it to the New World, while in the colonial sphere it was conveniently ignored — it rarely implied a complete negation of all that the revolution had stood for. The rights of man were not recognized, nor was the principle of nationality, but the rule of the majority tended to be accepted as the alternative to absolute rule. The principle of unanimity in the state, to which the people as a whole are permitted to subscribe but which they are not allowed to question, had been given rudimentary expression in an experimental way by Napoleon, but not for another century was machinery to be devised that would make this principle (though in the sphere of religion it had once been the rule) a practicable alternative to the absolutism of one or the rule of the majority. The stigma of its association with Napoleon perhaps explains the long quiescence of this powerful answer to the doctrinaire's prayer.

Legitimism, on its constitutional side, was thus a step forward from despotism, even from benevolent despotism, in the direction of liberal institutions, and as such it was supported by many who had subscribed to the ideals of the revolution.

Both the Romantics in literature and the Idealists in philosophy, for varying reasons, climbed on the legitimist band-wagon, not always to perch there very securely. But legitimism from the first aroused the opposition not



only of the Bonapartists but of all those who remained advocates of the sovereignty of the people, and to these were added all whose national aspirations had not been satisfied, whether they cared for popular sovereignty or not.

For Talleyrand, who originated the principle, legitimism was expediency, a device to save France from a feared dismemberment and to keep for her the natural frontiers of the Rhine, the Alps and the Pyrenees. He succeeded in converting the Tsar of all the Russias to his principle at Paris in 1814, and all but succeeded in securing the natural frontiers at Vienna. For Alexander I, who popularized the principle after his conversion, it was yet another ideal in following which he could continue

TALLEYRAND,  
ALEXANDER I  
AND  
METTERNICH

to adhere to both liberalism and autocracy at once. His belief in "free institutions, though not such as are forced from feebleness, nor contracts ordered by popular leaders from their sovereigns, nor constitutions granted in difficult circumstances to tide over a crisis" shows both the condescension and the conservatism of legitimist constitutionalism, and initiated a tradition well upheld a third of a century later by Frederick William IV of Prussia, who, in 1849, "would not pick a crown out of the gutter". For Metternich, who systematized the principle, legitimism stood for stability, and provided insurance against the twin evils of revolution and republicanism. It was he who relentlessly applied the principle through thirty years of European development, and who indissolubly associated it in the eyes of liberals with reaction.

Legitimism in practice is seen at work first of all in the Vienna treaties, of which one of the two most significant legitimist constitutional documents, the German *Bundesakte*, formed part, but of which the other, the French *Charte*, did not. At times legitimism was interpreted as the negation, not only of the revolution and the

republic, but of any sort of constitutional rule, as in the Spain of the restored Bourbons. At other times, as in the Congress kingdom of Poland, it was regarded as implying a written constitution of a type so advanced for those reactionary days that it was actually called "liberal".

LEGITIMISM  
IN THE  
VIENNA  
TREATIES

In Italy legitimism took an extreme reactionary form (notably in Naples and the Papal States) and no constitutions were granted; but in the Netherlands, where another Congress kingdom was set up under the ex-Staatholder, and the principle of legitimism was flouted (as it was in Poland) in the territorial settlement, a legitimist constitution emerged from an illegitimist act. In Germany the reception of legitimism was mixed; for Germany as a whole the confederate *Bundesakte*, in its thirteenth article, promised constitutions with assemblies of estates in the member states; a few only of the rulers of these states interpreted the article broadly and granted constitutions proper, but the majority, including Austria and Prussia, ignored it, as they ignored the constitutional aspect of the legitimist movement altogether. Legitimist constitutionalism thus represents only one side of legitimism as a whole.

Those of the restored or reassured monarchs of the era of 1815 who decided to give to their countries, out of their infinite goodness, written constitutions, had no ready-made models which they could adapt to their local needs, and rarely any domestic tradition of constitutional government. Constitutions of the Bonapartist stamp were naturally looked on with disfavour, while anything associated with the French Revolution, including the monarchical constitution of 1791, were of course anathema. The example of the United States of America was not yet taken seriously or understood adequately in Europe, and Britain, who had developed a constitutional monarchy of imposing appearance and achievement, had not reduced her governmental

LEGITIMIST  
CONSTITU-  
TIONS

system to a compact constitutional code. Europe might be asked to venerate, but could hardly be expected to adopt, what it was unable to comprehend.

Nevertheless, in a vague way, the British system was perhaps the principal influence in the making of the legitimist constitutions. The cloud which

THE BRITISH  
MODEL

had hung over Britain for a while after the American Revolution was dispelled long before 1815. Britain's prowess, not to mention her subsidies, during the long wars against Napoleon, had raised her prestige high again. Her constitution appeared to Europe to have preserved her in some metaphysical way from the onslaughts of revolutionary movements, as well as from the insanity of her king and the inanity of her royal family. Her king was most emphatically not the state, especially after 1811, yet the state prospered and Parliament continued to debate resoundingly and freely before all the world in the pages of Mr. Cobbett and Mr. Hansard. The growing demand for a more representative legislative system did not yet obtrude enough to shake the complacency of Europe with regard to the British constitution. Certainly it would have been copied extensively in 1815 if only its outlines had been clearer.

As it was, it was better understood then than it had previously been. The younger Pitt had given it some much-needed definition, and a new generation of continental commentators now began to wrestle with its mysteries. Benjamin Constant, principal author of the *Acte additionnel* and an important figure in political thought under the French Restoration, had examined it in his *Cours de droit constitutionnel* in 1814. Montesquieu's simplification of the British constitution was by now suspect, and the division of functions began to be pointed to as the key, instead of the separation of powers. Britain herself might have a *roi fainéant* (that was a matter of taste), but she had a ruling oligarchy that kept all

effective power undivided in its hands, and strong government combined with the preservation of the liberty of the subject (though under Pitt this happy combination had for a while receded into the background) appeared to have been secured. Legitimist monarchs who were constitutionally inclined could not but turn their eyes across the Channel. Louis XVIII had lived for many years in England, and his Charter set the pace on the continent. For political as well as for constitutional reasons the new form of government in France, with its British affinities, found favour across the Rhine. "The German middle states sought, against the absolute Eastern powers, connection with the liberal Western powers, and decided there was no better way of giving expression to this tendency than by the adoption of constitutionalism." The *Charte* was received rather in the way the *Codes* had been received in these same states in the days of the Confederation of the Rhine, in Bavaria, Baden, Hessen and Würtemberg, and but for the discouragement offered by the Vienna final act in 1820, other states might have quickly followed suit.

INFLUENCE  
THROUGH  
FRENCH  
CHARTER

Had interest in a remote part of Europe, in a state that had long since ceased to shake the world, been greater, or had the generation of 1815 possessed its Pölitz or its Rotteck and Welcker to make its political institutions more accessible to foreigners, the legitimist rulers might also have turned to Sweden for inspiration in their constitution-building, for Sweden had, in 1809, received a constitution which embodied a compromise emerging out of the struggle for supremacy, several centuries old, between the monarch and the estates represented in the parliament, or *Riksdag*. Gustavus IV, whose rule had been autocratic, was deposed in 1809, and the regent accepted a fundamental law adopted by the *Riksdag*. Though here were circumstances not entirely palatable to legitimist monarchs (the subsequent succession to the throne of

A POSSIBLE  
MODEL IN  
SWEDEN

Sweden of Bernadotte, one of Napoleon's marshals who had opportunely changed sides, was even less palatable, and they swallowed that), they were circumstances not very unlike those which had ended the seventeenth-century constitutional struggle in England, when James II had been deposed and Dutch William had accepted Parliament's interpretation of the constitution and the monarchy. The British constitution had remained largely a matter of interpretations, but the Swedish, after 1809, stood clear-cut in a relatively short document. The constitution itself (*Regeringsform*) was supplemented in the same and the following year by several organic laws, organizing the legislature (*Riksdagsordning*), regulating the succession (*Successionsordning*) and establishing the liberty of the press (*Trykfrihetsförordning*).

Under the Swedish constitution of 1809, the king, though no longer a despot, as between 1772 and 1809, was also not a *roi fainéant* as between 1719 and 1772. It was declared that "The king alone shall govern the kingdom" (article 1), but it was provided that he should

SWEDISH  
CONSTITUTION  
OF 1809  
DEFINES  
ROYAL POWER

rule with the advice of his council of state, particularly in concluding treaties and alliances (article 12) and in making war and peace (article 13). The king was required to honour the rights of the subject, such as freedom from arbitrary arrest, imprisonment, trial or banishment, inviolability of the home and freedom of religion (article 16). The king exercised the prerogative of pardon, but only in consultation with the supreme court and through his council of state (article 25), and while he appointed all state offices, this also was to be done through the council of state (article 28). All his orders needed countersignature by a minister, who could refuse his signature without incurring any penalty if he considered the action to be unconstitutional (article 38). The king appointed bishops, as well as mayors and certain other local officials, from a list of three names submitted to him

in the case of each vacancy, without countersignature (articles 29-31) and could appoint and dismiss officers of his court at will (article 48).

The ancient parliament of four separate estates—the nobles, the clergy, the burgesses and the land-owning farmers—was retained in 1809, and many of the powers it had lost during the absolutist reaction were restored to it, and crystallized as fundamental law. The estates were to

“RIKSDAG” OF  
FOUR ESTATES  
REHABIL-  
TATED

meet at least every five years (article 49); the presidents of the burgher and farmer estates were to be appointed by the king (article 52), but the ancient right of the Swedish people to tax themselves was established in giving to the estates the exclusive power to raise taxes (article 57), while supplies were only to be used for purposes previously designated (article 65). Neither new taxation nor the compulsory levy of men, money or goods could take place without the consent of the estates (article 73), nor was the king to raise new loans or contract debts on behalf of the state without their consent (article 76). The general legislative power was shared equally and co-operatively by king and estates, for laws could not pass without the consent of both, the royal veto being absolute and the estates' rejection final (article 87). Changes of the constitution required the approval of the king and of each of the estates deliberating separately (article 81), and this applied to the other fundamental laws designated in article 85. Final interpretation of the laws lay not with the supreme court, which could give only temporary interpretation, but with the *Riksdag* or estates (article 88), and the *Riksdag* had also the right to examine periodically the qualifications and record of the members of the supreme court and to decide whether they should continue to serve (article 103). Finally, members of the estates were accorded parliamentary immunity and their officers were protected (articles 110-113), while all the ancient privileges of the estates were declared to remain

in existence, subject to no alteration without their own consent (article 114).

This constitution, as befitted a compromise following two violent swings of the pendulum, was an amalgam of old and new ideas, but the result was a constitutional monarchy of a definitely (though not severely) limited type. The king was in effective control of the executive arm, assisted by ministers who were his appointees and not responsible to the estates, and he possessed an absolute veto over legislation and constitutional change. On the other hand, the estates possessed very extensive powers in the sphere of finance, and effectively participated in the passing and interpretation of legislation. It was not a sovereign parliament, but neither was the king its sovereign liege, except in a formal sense, while certain rights of the citizen were protected against both king and legislature.

Even had it been better known, perhaps the Swedish constitution of 1809 might still have been ignored by legitimist monarchs elsewhere; because it was a compromise and not a condescended instrument; because a local and archaic system of four estates was retained when the fashion was two houses, one aristocratic and appointed and the other giving some measure of popular representation; because, above all, Sweden was no longer a great power to be flattered by imitators who sought her favours, her alliance, or her way to success. In any case it was ignored. In a way, this constitution represents an advance fashion of 1830 rather than of 1815, for the legitimists, who would have regarded a Swedish type of monarchy as insufficiently assertive against the pretensions of legislatures and people in 1815, were only too willing after 1830, if they could thereby save their crowns (and sometimes it was too late), to limit their prerogatives as far as, or even further than, those of the Swedish king.

The Swedish constitution proved to have defects, but

they were not defects of the fundamental type of those of most of the legitimist constitutions, and it provided a governmental stability such as none of them gave and such as Sweden had never before possessed.

Relatively easy to amend, it not only outlived all the unamendable legitimist constitutions which broke when they would not bend, but it remains to this day the oldest fundamental law now in force in Europe. It has survived the gusts of 1830, 1848, 1866, 1902, 1905 and more recent crises. It has seen the disappearance of the four ancient estates, to be replaced by two houses (1866), and then the partial democratization of the upper house and the complete democratization of the lower (1894 and 1907), with the introduction of a universal franchise, proportional representation and the referendum. It has seen a union (1814) and dissolution (1905) of crowns with Norway. It has seen the reorganization of the council of state (1840), the appearance of a ministry responsible to the legislature and the creation of the office of prime minister (1876). It will probably prove capable of absorbing many further changes should they be needed. Its original soundness and its subsequent elasticity have contributed not a little to the circumstances which have enabled Sweden, since 1809, to live at peace with herself, with her neighbours and with the world. The Vasa lived dangerously and died violently and they rarely found time to give Sweden good or stable government, but out of the unpromising material of a Napoleonic marshal Sweden obtained a dynasty willing to accept limited and constitutional monarchy under a compromise constitution, and to submit without persistent opposition to a process of democratization within the framework of that constitution. The constitutional history of Europe might have been less tempestuous during the hundred years after 1809 if Bernadotte had bitten, not only some of Napoleon's other marshals, but his cousins by adoption—the legitimist monarchs of Europe—as well.

RESILIENT  
AND  
RELATIVELY  
EASY TO  
AMEND



Bereft of clear guidance from Britain, and scorning or ignoring a useful model in Sweden (Norway derived her constitution of 1814 from the hated revolutionary tradition, and recognized the sovereignty of the people, so it would not have been considered, even had it been better known), the legitimist constitutions tended to be somewhat ingenuous documents in which monarchs who often did not really believe in constitutions presented constitutional monarchies to peoples who often did not really believe in monarchy, the rulers all the while carefully explaining that nothing was actually being conceded, or, at any rate, that it could all be withdrawn at any time. But in the end it was the legitimists themselves who had to withdraw.

LEGITIMIST  
CONSTITU-  
TIONS  
INGENUOUS  
AND  
AMBIGUOUS

## CHAPTER IX

### LEGITIMISM IN FRANCE

THE French *Charte* of June 4, 1814, was the archetype of legitimist constitutions. Under it the *ancien régime* was not completely restored (much as many a returning *émigré* would have desired this) but in the language of absolutism and autocracy France was given the substance of constitutional if not of limited monarchy. The British constitutional model, where used, was modified to meet the special circumstances and the pretensions of the restored Bourbon monarchy. No longer was the translation according to Montesquieu, for the Bourbons, who are reputed to have forgotten nothing, remembered the disastrous experiment of 1791, and had, during their exile, learned (contrary to repute) something regarding the actual working of the British constitution. Indeed, a sojourn in England constituted *Lehrjahre* for more than one dispossessed ruler or heir during the revolutionary and Napoleonic era. William of Orange was another who went to the same school.

CHARTER  
GIVES CON-  
STITUTIONAL  
MONARCHY

They studied not only British ways but also British history, and though the undoubted similarity between the course of events after the restoration of the Stuart monarchy in 1660 and the Bourbon monarchy in 1815 can be ascribed less to conscious imitation than to circumstances approximately the same, Louis XVIII was at least resolved not to go on his travels again. He was the Charles II and his brother, Charles X, was to be the James II of the Bourbon restoration. The Bourbon restoration was brought about by the collaboration of

RESTORATIONS  
OF 1660  
AND 1814  
COMPARED

certain leading figures of the Bonapartist "interregnum" with the royalist party, but the rule of the coalition that effected the restoration was soon replaced by a "white terror" of extreme reactionaries, and when a less compromising figure than the monarch originally restored came to the throne, the *régime* wrecked itself by breaking the terms on which the restoration had been effected and peacefully consummated. The revolution of 1830 can be compared with that of 1688. Driven into insurrection by positive arbitrary actions of the king and his ministers, the opposition was able to force him to forsake the country, whereupon the throne was declared vacant, an invitation issued to a near relative to assume the headship of the state, a pact made with this new ruler, and an unequivocally limited monarchy established. The *Charte*, as revised in 1830, was recognized as a pact between king and people, with neither definitely stated as possessing full sovereignty, but with the king, by the very nature of his acceptance of the throne and constitution, very definitely not retaining it exclusively. The sovereignty of the people still remained unrecognized, but the legitimist position had been rendered untenable. 1830 was the half-way house to 1848.

REVOLUTIONS  
OF 1688  
AND 1830

After the first abdication of Napoleon, the French provisional government had recalled the Bourbons, but its "Senate constitution" of April 6, 1814, which proclaimed the sovereignty of the people, was naturally unacceptable to these princes, thirsting after twenty years of exile for the trappings of absolutism. The very word "constitution" was rejected by them in favour of "charter", a term with feudal connotations, and more indicative of the condescension with which Louis XVIII accorded to his people this written instrument of government. Following more or less closely the guarantees offered in the declaration of St. Ouen of May 2, this *Charte* of June 4, 1814 (issued more than a year before Waterloo, it should be noticed) sits nicely on the fence

that separates the nineteenth century from the eighteenth, and gazes steadfastly both ways at once. The autocratic preamble and the seventy-six articles which follow it and set up a constitutional *régime* flatly contradict each other both in spirit and in letter.

CHARTER  
CONTRADICTS  
ITS PREAMBLE

"Our first duty toward our people was to conserve, in their own interest, the rights and prerogatives of Our Crown" crowns the preamble, but articles 1, 2 and 3 guarantee the equality of all before the law, for purposes of taxation and in eligibility for civil and military office; articles 4, 5 and 8 promise liberty of the person, liberty in the practice of religion, and liberty of the press; above all, article 9 states, "All kinds of property are inviolable, without any exception of that known as *national*, and the law makes no distinction between them". Thus, in order to enjoy the throne of his forefathers, and listening to the advice of his less embittered well-wishers, was Louis XVIII prepared to whitewash the revolutionary sepulchre, and he added liberty of the person and of the press to what Napoleon had considered to be the proper heritage of the revolution, putting the latter in the bad strategic position from which he attempted to extricate himself in the *Acte additionnel* and the *Mémorial de St. Hélène*. The twelfth and last article of Louis' declaration of rights went further than Napoleon could ever honestly consent to follow, for it abolished conscription. "Conscription", said Napoleon, "is the eternal root of a nation, purifying its morality and framing all its habits." He did not explain how.

The executive power was declared to belong to the king alone, and he was "the supreme head of the state" (article 14). His ministers were called responsible, but they were responsible to him rather than to the legislature or the people, and they did not need to be members of the legislature, though they were not excluded from it.

EXECUTIVE  
POWER

It was stated that the legislative power was exercised collectively by the king, the Chamber of Peers and the

Chamber of Deputies, but beside having the right to issue regulations and ordinances "necessary for the execution of the laws and for the safety of the state" (article 14), the king alone possessed the power to propose legislation, which was then discussed and voted upon, without amendment being permitted, first by the peers and then by the deputies (in the case of budget laws the order was reversed). The king alone could sanction and promulgate laws.

LEGISLATIVE  
POWER

The peerage was hereditary, but new peers received no privileges other than the right to sit in the legislature at the age of twenty-five and to take part in its deliberations at the age of thirty.

HEREDITARY  
PEERAGE

All deliberations of the House of Peers were secret.

"The Chamber of Deputies of the Departments" was dealt with only in outline by the Charter, leaving the details to be filled in by electoral laws. Deputies were to be indirectly elected (the electoral colleges being retained and the representation of each department remaining the same as under the empire) for five years, but one-fifth of the Chamber was to be renewed each year; to be eligible one had to be at least forty years old and pay in direct annual taxes at least a thousand francs. The franchise could be given only to those who paid at least three hundred francs in direct annual taxes and who were at least thirty years old. The tax-paying qualification was understood to be a minimum for both voters and deputies, and meant a maximum of 100,000 voters out of a population of twenty-five million. It did not extend the franchise to the lesser *bourgeoisie*. The object was patently, as a chamber of deputies had to be included, to ensure *une chambre conservatrice*, and France was not surprised, on the basis of this series of restrictions, to find herself very soon with *une chambre introuvable*. No revolutionary or Bonapartist franchise had been so limited as this. It

CHAMBER OF  
DEPUTIES  
ELECTED ON  
NARROW  
FRANCHISE

provided too narrow a base for the Charter ever to achieve adequate stability. The Bonapartist device of giving the vote to all, but of robbing that vote of all weight, was abandoned in favour of this more timid course, which was psychologically far less sound.

The judicial system was little changed. The judges, once appointed by the king, were irremovable (a provision copied by the *Acte additionnel* to replace Napoleon's five probationary years for judges). The Civil Code and other existing laws, if not contrary to the Charter, were to remain in force until expressly repealed or amended. Existing military ranks, honours and pensions were guaranteed preservation; the legion of honour was retained; the old nobility regained and the new nobility of Napoleon retained their titles. Privileges were in no cases to accompany grants of titles to nobility. Thus, in the Charter, honour was served, but unfortunately these clauses were to be more honoured in the breach than in the observance once the Bourbons were again safely in the saddle.

What might have been the reception of a charter such as this, if it had been issued by Louis XVI any time between 1774 and 1789, is a fascinating speculation, but by 1814 it was too much at loggerheads with the time-spirit to find easy or enthusiastic reception. The Senate constitution which had immediately preceded it was far more liberal; the *Acte additionnel*, having the advantage of following it, was able, while copying it extensively, to outbid it in popular appeal; the project for a constitution prepared after Waterloo by the Chamber of Representatives and published on June 29, 1815, while falling short of the Senate constitution of the previous year, sought to make of the Charter a more palatable instrument by grafting on to it certain features of the latter and of the *Acte additionnel*, such as giving the initiative in legislation

FEW JUDICIAL  
CHANGES

AN  
UNPALATABLE  
INSTRUMENT

to the two chambers as well as to the king, instituting a universal manhood suffrage, and according special representation to manufacturing and commercial interests. But the declaration of rights published by this same Chamber of Representatives on July 5, 1815, declared "All power emanates from the people", called for a strict separation of powers, and demanded an oath to observe the declaration from any prince before he could ascend the throne of France. Despite the shaking that the meteoric return of Napoleon had given him, Louis XVIII, when he waddled back in the baggage-train of the victorious allies, decided against any further concessions, and the Charter of 1814 was once more put into force in its original form.

Nobody loved it, but the group euphemistically known as the constitutionalists gave it their grumbling support, Chateaubriand complaining, among other things, in *De la monarchie selon la charte* (published in 1815) that a king who could do no wrong should not possess the initiative in legislation (though he objected also to the Chamber's budgetary powers), protesting that the peers should not deliberate in secret (though he thought they ought to have social and economic privileges befitting their rank), and demanding that ministers should possess the confidence of the chambers and take part in debates. While its friends subjected it to

FRIENDLY AND  
UNFRIENDLY  
CRITICS

ragged criticism such as this, its enemies on both sides treated it with contempt. The reactionary ultra-royalists wanted the *ancien régime* unadulterated, and in such a scheme the legal equality and the guarantee of the revolutionary transfer of property could find no place. The liberals, whether they regarded themselves as Bonapartists (for the legend of Napoleon's liberalism was already in being) or as republicans, would also have none of it, when the Senate constitution of 1814, the Chamber's project of 1815 and even the *Acte additionnel*, all came nearer to their aspirations.

• The *régime* of the Charter, with such forces at work, became a triangular struggle between reactionaries, constitutionalists and liberals, in the course of which the Charter itself was ultimately torn to shreds. The first election, producing the Ultra-dominated *chambre introuvable*, led to a white terror, and Louis, horrified at the possible consequences of such a reaction, dissolved this chamber in 1816. The constitutionalists, in power until 1820, gave much needed steadiness to the legitimist restoration by gaining France admission to the Concert of Europe (at Aix in 1818) and passing electoral, press and judiciary laws in accordance with the spirit of the body of the Charter and not of its preamble. Returning to power in 1820, the Ultras (especially after the assassination of the Duc de Berri) embarked once more upon a course of reaction. When the leader of this reaction became king as Charles X upon the death of Louis XVIII in 1824, the movement was accelerated. A milliard francs in compensation for the loss of lands and goods that even Charles X dared not restore to them, was voted to the *ex-émigrés*, and the reactionary Chamber of Deputies prolonged its own life from five to seven years (all members retiring at the same time instead of some each year) — the Septennial Act (1824) of the Bourbon restoration! With the elections of 1827 came a swing of the pendulum, but after the short interlude of a more liberal ministry, the ultra-reactionary Polignac ministry defied not only the Chamber but the Charter as well. A dissolution only resulted in the election of a more liberal Chamber, and then the “four ordinances” (dissolving the new Chamber, abolishing the liberty of the press, restricting the franchise further by counting only taxation on land for qualifying purposes, and fixing new elections on the basis of the restricted franchise) gave the final provocation which led to the revolution of 1830. Once more the capital took the lead, but Paris did not

A TRIANGULAR  
STRUGGLE,  
1815-1830

THE FOUR  
ORDINANCES



go so far as to obtain a restoration of the republic. Before that happened another eighteen years had to pass. Guided by Guizot, the Chamber declared that the throne was vacant following the violation of the Charter by Charles X, that the preamble of the Charter was suppressed "as

END OF  
LEGITIMISM  
IN FRANCE

wounding the dignity of the nation, by presuming to grant to the French people the rights which they possessed inherently", that the remainder of the Charter should be revised, and that Prince Louis-Philippe, son of Philippe "Égalité" (and already serving as lieutenant governor of the kingdom following the flight of Charles X) should, after having taken the oath to maintain the constitution, become "King of the French". Thus ended legitimism in France.

## CHAPTER X

### LEGITIMISM IN GERMANY

DURING the course of the eighteenth century the situation in Germany had been fundamentally changed by the gradual emergence of Prussia as a great power. Based on the work of the Great Elector and Frederick William I, the skill and achievements of Frederick the Great in the Seven Years' war had clearly brought her to this status, and with it came the rivalry with Austria, the dualism which was to dominate Germany's strivings for national life and constitutional expression for over a century.

DUALISM  
OF PRUSSIA  
AND AUSTRIA

The intensity of this dualism even before the end of the eighteenth century is seen in Frederick's League of Princes against Austria in 1786, but Frederick used diplomatic, not constitutional devices, against his rival. He had no more idea of destroying the Holy Roman Empire than Maria Theresa or Joseph II had of reforming it. It remained for the nineteenth century to see the German problem as a constitutional problem.

The impact of the French Revolution temporarily pushed dualism into the background as Prussia and Austria signed the Declaration of Pillnitz together in 1791, and joined in crusade against the revolution in 1792; but the dividing line was firmly redrawn between 1795 and 1805 by the neutrality of Prussia, while Austria remained intermittently at war with France, and was underlined by the creation of a "troisième <sup>A</sup> <sup>"TROISIÈME</sup> <sup>ALLEMAGNE"</sup> Allemagne" in the Confederation of the Rhine, and by the final snapping of the by then almost invisible link of the Holy Roman Empire in 1806. Dualism was again momentarily forgotten in

the enthusiasm of the War of Liberation and the Battle of the Nations, only to re-emerge as potent as ever as a force to be reckoned with at the Congress of Vienna, and though Metternich threw a hood over the Janus head of Germany, he could only obscure, and not eradicate this ugly feature entirely. The creation of one league, however weak, of all the German states, under the leadership of Austria was, for him, a sufficient diplomatic success at a time when the revolution, Napoleon and the liberation had released the forces of nationality in the German states. Metternich had to abide Prussia remaining powerful and, indeed, gaining power at Vienna, but he could at least exult at the decimation of the "troisième Allemagne". Better a Janus than a Cerberus.

The treaties of Vienna offered as a solution to the German problem the constitution of the *Bund*. A more

THE "BUND"  
OF 1815

inadequate solution could not have been achieved, and it fettered and dragged back all other efforts in the direction of constitutional reforms for fully thirty years. The force of circumstance and the interests of the parties concerned prevented the restoration in its complete futility and complexity of the old empire (as a literal regard for the principle of legitimism would have required), but as an instrument for providing Germany with a central authority to enable her states to act in common for various purposes, and to give expression to the feeling of a common German nationality, the confederation of 1815 was hardly more effective. The *Bundesakte* possessed about all the faults that might render a constitution utterly useless, and the new *Bundestag* was the *Reichstag* of Ratisbon in more modern dress, but just as cumbersome and equally impracticable.

A confederation which contains both large and powerful and small and insignificant states, tends to err on the side of giving the smaller states a voting power out of all proportion to their importance. In the United States of

America this dilemma was compromised rather than solved, and its horns appear to this day in the equality enjoyed by Nevada for certain constitutional purposes with states such as New York, California, Michigan and North Carolina. In the *Bundesakte* of 1815 this tendency ran disastrously amuck, and we find the five-sixths of the population of Germany that lived in the seven largest states being allotted a minority of twenty-seven votes in the *Bundestag*, while the remaining one-sixth had forty-two votes. In addition to this, all matters of importance and anything involving modification of the fundamental law of the *Bund*, were subject to a *liberum veto*, and thus "a new Polish Diet was founded; a permanent obstacle was imposed against the legislative development of the future German United States; the party of reform was forced into the paths of revolution."

DEFECTS OF  
"BUNDES-  
AKTE"

The ideas and motives behind this travesty of a constitution, and the aims of those who had most to say in the making of it, sufficiently explain its provisions. Some few states and a few Prussian statesmen did genuinely desire an effective *Bund*, within carefully defined limits, but the majority of the south German states, jealous for the preservation of their particularism, and Austria, who already realized that in a truly effective German *Bund* she would find no place she could accept, were able to circumvent this vaguely expressed desire for a greater measure of unity. Actually, there was in the Germany of 1815 as a whole, neither an urgently enough felt need for an effective federation, nor the political and constitutional ability to express and to meet this need. Treitschke points out that "The pitiless pressure of necessity which had formerly compelled the individual states of North America unwillingly to renounce their sovereignty, was not operative at this moment when all the world hoped for a period of prolonged peace".

IDEAS  
BEHIND  
THE "BUND"

In eleven short sessions this momentous *Bundesakte*, sponsored by Metternich, was framed, then watered down under pressure from Bavaria to an even less effective confederation, as the price of her adhesion. Baden and Württemberg (as did Rhode Island and North Carolina when the American constitution of 1787 was presented for ratification) refused at first to have anything to do with the new arrangement, and only signed after Waterloo.

It solved nothing and created nothing — except discontent and despair and fresh obstacles. The vague thirteenth article, which implied that each state of the *Bund* was to establish a constitution with assemblies of estates, was only in a few cases taken notice of; the problem of the dualism and rivalry of Austria and Prussia was left untouched, to become more and more of a *Machtfrage* to be solved only by blood and iron, and less and less of a *Verfassungsfrage* to be dealt with by speechifying and majorities. The exaggerated extra-voting power of the petty states drove the greater powers of Germany to resort to diplomatic intrigue at the smaller courts, and tended to make all decisions of the *Bundestag* merely the result of arrangements, deliberations and bargains concluded outside the assembly; the presence of a foreign element in the *Bund* through the connection of Hanover with Britain, Holstein with Denmark, Luxemburg with the Netherlands, and so on, rendered the wide powers of obstruction given to the individual states, and such provisions as the *liberum veto*, particularly dangerous to the strength of Germany; finally, the incorporation of the *Bundesakte* in the treaties of Vienna, made foreign interference not merely a danger but a legally sanctified eventuality, should an attempted reform of the *Bund* violate any of the sacred clauses of a treaty guaranteed by all the leading powers of Europe. “The settlement of 1815 had made the German problem a European problem.”

GERMAN  
PROBLEM  
BECOMES  
EUROPEAN

• The futility of the *Bundesakte*, which was less important for itself than for the hatred and contempt it inspired, meant that the document as a whole was of little more than antiquarian interest, but article 13 is justly memorable, the one monument in an otherwise undistinguished graveyard, both for its implications and for its ambiguity. Its significance has been overrated, but at least it outweighs that of all the other articles of the *Bundesakte* put together. It states: "In allen Bundesstaaten wird eine landständische Verfassung stattfinden".

ARTICLE XIII  
OF THE  
"BUNDES-  
AKTE"

This does not mean as much as if *landständisch* could have been interpreted as meaning *repräsentativ*. To impose upon each of the states the duty of providing representative institutions was something more than demanding only "a constitution with assemblies of estates". Metternich and Gentz attempted at Carlsbad in 1819 to dispel any tendency on the part of German states toward confusing these two terms, by treating *landständisch* as legitimist and *repräsentativ* as revolutionary, and they asserted that article 13 actually forbade the setting up of representative government. In the following year they wrote into the Vienna final act an even more definitely legitimist interpretation of article 13, for while it was reaffirmed that every state must obey article 13, and while the resultant constitutions were to be placed under the protection of the *Bund*, it was also laid down (article 57) that the whole of the authority in the state must remain in the hands of its head, and that while the sovereign could, in his constitution, delegate certain functions and allow the estates to co-operate with him in the execution of certain of his powers, he could not alienate any of these powers. The German idea of a constitutional dualism of monarch and estates (so stoutly defended by the estates of Würtemberg in the recent constitutional conflict of 1815) was thus rejected in

VIENNA FINAL  
ACT AND  
ARTICLE XIII

favour of the idea, which had found full expression in the French *Charte* of 1814, that the monarch was the fount of all power. But this article of the *Schluss-Akte* really only ratified a procedure already adopted, without exception, by those German rulers who, up to 1820, had given to their peoples constitutions with assemblies of estates. Legitimist constitutionalism had been received before it was prescribed.

In eighteenth-century Germany the traditional power of the various feudal estates was, as in so many other parts of Europe, in a state of general decay.

DECAY OF  
ANCIENT  
LIBERTIES IN  
GERMANY

The modern constitutional era had nowhere dawned, but the ancient agreements (as, for instance, the Pact of Tübingen of 1605) were no longer being honoured by rulers whose inspiration was Versailles or Potsdam or Schönbrunn, and who, whether or not they tried to be enlightened, all wanted to be despots. Ancient liberties had been most firmly embedded in the duchy of Württemberg, but they too had disappeared about the middle of the century, and their partial revival in 1770 was only temporary. The duke was raised to the status of king in 1805, and armed with his new prestige he was able to abolish the estates in 1806 — as relics of feudalism! The influence of French ideas, and membership of the Confederation of the Rhine, brought a great deal of modernization to Württemberg, but it was introduced by a king as yet unfettered by a constitution and no longer embarrassed by estates.

But constitutional ideas were stirring in Germany. The variations upon the constitutional theme produced

STIMULUS OF  
CONFEDERA-  
TION OF THE  
RHINE

by the American and French Revolutions could not leave her entirely unmoved. The constitution of the Confederation of the Rhine, dictated as it was, was nevertheless a written fundamental law very different from the shadowy organization of the defunct Holy Roman Empire, and, as such, was something entirely new to Germany.

The revolutionary type of constitution was, of course, unthinkable, and the Bonapartist type was only thought about where the influence of Napoleon was sufficiently hypnotic, as in Bavaria (who, entranced by the prospects of greatness that Napoleon appeared to be offering her, adopted in 1808, through the mediumship of Montgelas, a constitution modelled upon that of the kingdom of Westphalia, and equally bogus); but men of light and leading in Germany were beginning to feel that if only native ideas and institutions could be made to run into constitutional moulds, her states would be better equipped for the future. "The Prussian state has no constitution. The supreme authority is not divided between the head of the state and the representatives (*Stellvertretern*) of the Nation", wrote Stein in 1806 in the process of analysing the defects which had contributed toward her defeat and *débâcle*. But Prussia, though she led the movement for the liberation of Germany from Napoleon's domination, did not lead the movement toward constitutionalism. Her reforms, though extensive, were in the old piecemeal tradition of benevolent despotism, carried through by an efficient bureaucracy, the first servant of aggressive ministers, themselves only the first servants of an acquiescent king, who saw himself as the first servant of the state, but not of the people. The representatives of the nation remained unorganized and unconsulted.

Spontaneous constitutionalism first blossomed in Germany in the tiny state of Saxe-Weimar-Eisenach, where the duke Karl August (to the disgust of Goethe, who had assisted in making his despotism more enlightened than any other in Germany) promulgated a constitution on September 20, 1809. The exercise of power in the state was divided between ruler and estates, and certain rights were guaranteed to the subject. There was no question of any alienation of sovereignty; the duke gave the constitution,

CONSTITUTION  
OF BAVARIA,  
1808

CONSTITUTION  
OF SAXE-  
WEIMAR, 1809



and what the duke had given the duke could take away ; but until he chose to do so, here was a regularly organized and genuine system of government based upon a comprehensive fundamental law. Ante-dated by three months by the Swedish constitution (the text of which Karl August may or may not have seen, though he would undoubtedly have heard of it) that of Saxe-Weimar was to be overshadowed as a model for the states of Germany by the French *Charte* of 1814. Those who copied the *Charte* might (had they deigned to do so) equally well have obtained most of their inspiration nearer home, but, nodding with Goethe, they remained disdainful. No other German state (apart from Bavaria with her Bonapartist constitution, the satellite kingdom of Westphalia and the grand-duchy of Frankfurt) entered upon a constitutional *régime* before the *Bundesakte* of 1815 was signed, though

FURTHER  
STIRRINGS OF  
CONSTITUTION-  
ALISM, 1810-  
1815

there were a number of false starts. In Baden there was drafted in 1810, but never enforced, a constitution (as befitted a leading member of the Confederation of the Rhine) of the Bonapartist type ; the old estates of Hessen-Darmstadt were abolished in 1813, but nothing replaced them ; a draft constitution of a tentative sort, with a single chamber legislature, appeared and then rapidly disappeared in Hanover in 1814 ; Nassau produced a draft in 1814 also, but this was shelved until 1818 ; the king of Württemberg, moving with the times, announced in January 1815 that he would draft a constitution and allow an assembly, partially elected, partially appointed by himself, to act as a convention to discuss this draft, but the opposition which the supporters in the assembly of the old *Württemberg* dualism made to the royal draft, caused a deadlock and the postponement of a constitutional *régime* until 1819 ; finally, in Prussia, the king issued a rescript on May 22, 1815, announcing the re-organization of the various provincial estates and the provision for the election by these estates of delegates

to meet in a united assembly at Berlin, but Prussia had to wait many more years before this was to happen, and even when it did there was still no constitutional *régime* until after the revolution of 1848.

Weimar, then, had a clear start over the rest of the members of the Germanic Confederation of 1815, for she alone anticipated the demands of article 13 of the *Bundesakte*, but, not content with this, Karl August revised and expanded his constitution in 1816 (taking advantage of the existence of the French Charter) and, in 1817, insisted that an embarrassed *Bundestag* at Frankfurt should guarantee this constitution in its new form against encroachments either of the duke or of the people. This was something he most decidedly did not get from the France of Louis XVIII, and the Vienna final act of 1820, while admitting a guarantee of individual state constitutions to be a duty of the *Bund*, provided that the *Bund* and not the individual sovereign concerned should decide the terms of this guarantee. It was highly improper and by no means playing the game of legitimism for a ruler to ask that his people should be protected against his own possible bad faith. Goethe continued to disapprove of Karl August's constitutional practices.

SAXE-WEIMAR  
CONSTITUTION  
REVISED 1816

Until the Carlsbad Decrees and the Vienna *Schluss-Akte* cast their blight over these proceedings, the process of honouring article 13 of the *Bundesakte* seemed to be gathering way in certain of the states of the Confederation, especially those in the south and west which had come most strongly under the influence of the French Revolution and Napoleon. Even Metternich suggested to his emperor in 1817 that Austria should have a *Reichsrat* of representatives of the provincial *Landtage* to meet (with appointed officials added) at Vienna, but this, like the similar Prussian move (which may have inspired it), came to nothing. Achievements in the three other leading south German states were more concrete. Follow-

ing the lead of smaller units (Weimar and the free cities of Frankfurt and Bremen, all of which published constitutions in 1816), Bavaria replaced her Bonapartist constitution of 1808 (which had never really worked) by a new one in 1818, Baden (after much labour, involving the drawing up of four successive drafts) produced her

BAVARIAN,  
WÜRTTEMBERG AND  
BADEN CON-  
STITUTIONS,  
1818-1819

first constitution in the same year, while Württemberg, with a new king on the throne, was presented with a constitution in 1819, which this time did go into force.

These constitutions, and those of certain lesser states promulgated at about the same time (Nassau in 1818, Lippe in 1819 and Hessen-Darmstadt in 1820) are cut very much to a pattern, and the styling is generally that of Paris, June 4, 1814. The king, prince or duke, ruling by the grace of God, gives to his people a constitution ; all authority in the state is vested in its head, who wields it in accordance with the constitution ; his person is sacred and inviolable ; he guarantees certain rights (usually copied almost *verbatim* from the *Charte*) to his people ; he is assisted by ministers who are his nominees, generally responsible for governmental acts they have countersigned, but not specifically responsible to the people or the legislature ; a bicameral assembly collaborates with him in legislation, but it cannot initiate, and only in financial matters is its consent always essential. The assembly tends to represent the remains of the old feudal society in the upper house and the more prosperous part of the new *bourgeois* society in the lower house ; the upper house consists exclusively of persons sitting by right of birth or office, together with certain nominees of the ruler ; the lower house represents various interests which usually appoint their own deputies, the members actually elected by any process laid down in the constitution usually being very few ; where there is election it is usually indirect, and a minimum age of thirty for membership of the lower house is prescribed ; a new

assembly is to replace the old after a stated number of years, and the assembly is to meet at stated intervals. Judges are appointed by the ruler and have security of tenure, and a uniform system of laws and procedure is guaranteed or promised. No special provision for amending the constitution is included; it is a *charte octroyée*.

The principle exception to this general picture of legitimist constitutionalism as received by certain of the states of Germany up to 1820 is found in the Württemberg constitution of 1819 —  
ESTATES  
CONSULTED  
IN WÜRT-  
TEMBERG  
 issued after and as a counterblast to Carlsbad. Although far from conceding the sovereignty of the people, although preserving all authority for the king, although devoid of a true representative legislature and of a ministry responsible to the people, it does state in its preamble that it is promulgated after consultation between the king and the estates and with the complete agreement of both. It is presented to the country as a joint action. To that extent the royal condescension characteristic of legitimist constitutions is modified. It is true that, unlike the Swedish constitutions of 1809, the Württemberg constitution of 1819 was originally drawn up by the king instead of by the estates, but it does represent a transition between 1814 and 1830 in being more than a mere *machina ex deo*.

The Carlsbad Decrees and the Vienna final act had the effect of putting an end to constitution making in Germany for a decade; any constitution devised within the framework they prescribed would have left the liberal elements disgruntled; anything else would have incurred the censure of Metternich and his creature the Diet at Frankfurt. The constitutional states, including Württemberg, retained their constitutions unimpaired, but the others contented themselves with piecemeal reforms introduced in the old authoritarian way, some-  
CHECK TO  
CONSTITUTION  
MAKING,  
1820-1830

times with the agreement of the estates (where these continued to exist) but often without this formality.

This decade of effective repression in Germany seemed to spell triumph for the system of Metternich, but a retrospective view must result in a doubt as to whether this was so in the constitutional sphere. The few German states that, between 1815 and 1820, adopted constitutions in accordance with or a little beyond the terms of the thirteenth article of the *Bundesakte* of 1815, took constitutionalism in a mild form, generally along the lines (as has been seen) of the French *Charte* of 1815.

INOCULATION  
AGAINST  
RADICAL  
REFORMS

This legitimist constitutionalism appears to have provided inoculation against such things as the sovereignty of the people, a democratic franchise, a representative upper house, and a ministry responsible to the legislature, for in Württemberg, in Bavaria, in Baden and in Hessen-Darmstadt, the constitutional structure of 1818-19 remained in existence, in fundamentals unimpaired, for exactly a century, until all the monarchical constitutions of the surviving states of Germany disappeared together, with the fall of the Hohenzollern Empire.

The overthrow of legitimism in France in 1830, following directly upon the successful conclusion of the Greek revolt against the Turks, and immediately followed by the Belgian Revolution and parliamentary reform in Britain, tended to embolden the constitutionalists in Germany and to persuade the rulers of a few more states that a degree of mild constitutionalism might prove useful insurance against dangerous unrest. The constitutions promulgated in Hessen-Kassel, Saxony, Brunswick and

FRESH  
GERMAN CON-  
STITUTIONS,  
1831-1833

Hanover between 1831 and 1833, could not but be affected by the fact that the model *Charte* of 1814 had undergone severe modification after the fall of Charles X. While they did not take the revised charter as their model in its stead, they tried to work out a middle line between

the two, retaining a specialized franchise and preserving the sovereignty of the prince, in theory unimpaired as the *Schluss-Akte* had demanded, but according more adequate financial control and a more positive part in legislation to the assemblies of estates, and giving to the judicial system greater guarantees of stability.

Brunswick saw the most decisive break with the legitimist principle, for there the tyranny of the young duke led to revolution and his deposition in 1830. The succession of his brother was an illegitimist act which Frankfurt and Metternich did nothing to prevent or undo, for the duke Charles was so flagrantly incapable, and after the immediate restoration of the rights and liberties of the people and the estates existing before 1823, a constitution which had the approval of the estates was issued in 1832.

LEGITIMISM  
ABANDONED  
IN BRUNSWICK,  
1830

In Hessen-Kassel (*Kurhessen*), after a temporary eclipse of the estates, 1830 saw them summoned once again, and 1831 produced a constitution which broke more decisively with the legitimist type than did that of Württemberg, and which Metternich tried to prevent the Frankfurt Diet from recognizing. It provided a legislature of a single chamber only, and gave to this body not only the right to grant taxes but also the initiative in general legislation.

HESEN-KASSEL'S  
UNICAMERAL  
SYSTEM, 1831

Saxony also became a constitutional state as a result of the unrest of 1830, and her constitution of 1831, though Metternich disapproved of it as well, was not sufficiently advanced to please the radicals in the state. The estates were reorganized, but the two chamber legislature which emerged, still retained much of the old aristocratic representation and weighed the scales heavily on the side of the landed interest, while its control over the budget was most tenuous. Nevertheless, it was a start, and it managed to remain in force (but not without profound modifications

SAXONY A  
CONSTITUTIONAL STATE,  
1831

in the composition of, and mode of election to the second chamber) until the end of 1918.

Hanover, though linked to the limited monarchy of Great Britain (a country whose constitution broke all the rules of the *Schluss-Akte* without propounding any clear rules of its own) by a personal bond, resisted constitutionalism until 1833, then bit at it timidly, only to vomit it forth again in 1837 when the link with Britain was broken. The disappearance of the cautious Count Münster in 1831 left the way clear for the promulgation by William IV from Windsor (acting through his Viceroy the Duke of Cambridge) of a constitution which went definitely beyond the liberties accorded by the governmental reorganizations of 1814 and 1819, but which (despite the association of the liberal Professor Dahlmann with its drafting) gave to the estates very inadequate control over finance, and left to the ruler the ultimate control over both houses through nomination or appointment to office. This mild piece of legitimist constitutionalism was, as it were, an escape from the circumscribed position of a king under the British constitution to the free air (for princes) of the *Schluss-Akte*. Here at least was a constitution which conformed to the Metternichian strait-jacket.

The year 1834 saw the strings of this jacket drawn even tighter by Metternich, who, in the Final *Protokoll* of the Vienna Conference of that year, persuaded the rulers of Germany to accept not only a stricter censorship (articles 28-37) and a more rigorous control over university life (articles 38-57), but to prevent their estates from criticizing the actions of the *Bund* (articles 17-18), and to deny them the supervision of the annual budget (article 20). In addition they were to take especial care (as, in the opinion of Metternich, Hessen-Kassel and Saxony had omitted to do) to preserve full authority in the state to the ruler (article 1), and to see that, in no

HANOVERIAN  
CONSTITUTION  
OF 1833

METTERNICH  
AND THE  
"SCHLUSS-  
PROTOKOLL"  
OF 1834

circumstances, was the army required to take an oath of loyalty to the constitution (article 24). A confederate court to decide disputes between a prince and his estates over the budget or the interpretation of a constitution was also set up (articles 2-14), but it was never to meet.

The *Schluss-Protokoll* of 1834 acted even more effectively than the *Schluss-Akte* of 1820 in putting a stop to a movement among the German rulers toward constitutionalism. A fresh prolonged lull lasted this time right through until the eve of the next "year of revolutions", 1848. But though constitutional advance in Germany during this period was slight and unimportant, there was on the other side a reaction in one state, Hanover, which put the clock back to 1814, if not into the *ancien régime*, and which produced the most uncompromising of all legitimist constitutions.

To his credit it may be said of Ernest Augustus, Duke of Cumberland, that he protested against the Hanoverian constitution of 1833 from the first. When, by the operation of the salic law, the crowns of Great Britain and Hanover were separated in 1837 and he became king of Hanover, he immediately declared that he did not consider the constitution binding upon him. He restored the governmental organization of 1819, which provided no adequate safeguards against arbitrary rule, and dismissed the seven eminent professors of Göttingen who protested against the abrogation of the constitution of 1833. As the Diet of Frankfurt had never been asked to recognize the constitution of 1833, it was able to avoid an embarrassing situation by adopting a policy of non-intervention in Hanoverian affairs when it was appealed to by the constitutionalists in 1839, and Ernest Augustus was left undisturbed to promulgate in 1840 a constitution of his own devising.

REACTION IN  
HANOVER,  
1837

This constitution, which lasted until it was engulfed by the liberal flood of 1848, reiterates again and again the fact of the king's unique authority in the state and



the subordinate position of the estates, using at times the actual wording of the *Schluss-Akte* and *Schluss-Protokoll*. The chambers were given very little scope and their deliberations were not to be published; the revenues of the royal domain were separated from those of the state and placed beyond the control of the estates; the ministers were responsible to nobody but the king; the succession laws provided no means of passing over the heir of Ernest Augustus, despite his blindness. This constitution is a long document, running to 182 articles, some of them containing many clauses, but it presents the barest necessities of a legitimist constitutional charter. Though it owes its debt to 1814 and borrows from the French *Charte*, it is even narrower in conception than was that instrument. Where the voice is the voice of Louis XVIII the hand is the hand of Charles X, and such was the political state of Germany in the thirties and forties, that what Charles X had failed to impose in France was imposed with impunity by Ernest Augustus in Hanover, and maintained for a decade. With the example of Hanover before us to counterbalance the picture of more liberal trends in the south German states, and with the longevity of the tentative constitutional systems of 1816-20 and 1831-33 in mind, it has to be conceded that legitimism in Germany lived well and died hard in the constitutional sphere, and preserved an authoritarian trend in government through a century of constitutionalism, for the achievement of fresh triumphs long after the ashes of legitimism were burnt and scattered.

LEGITIMISM  
SURVIVES  
LONG IN  
GERMANY

## PART IV

### PARLIAMENTARY CONSTITUTIONS— THE NEGOTIATED STATE

## Parliamentary Constitutions — The Negotiated State

*Legitimism had produced the somewhat anomalous phase of constitutional autocracy, wherein the monarch issued a fundamental law by which the functions of government but not the sovereign authority in the state were shared to a greater or lesser extent with representatives of certain classes of the citizens. Alongside this constitutional autocracy on the continent, Britain maintained the alternative of a constitutional aristocracy, which, having succeeded in reducing the monarchy to a formality in the state, had secured sovereign authority for a bicameral parliament (in which the lower house held the dominating position) and had elaborated a new ministerial executive responsible to this parliament. Those who remained dissatisfied with these systems called the constitutional autocracies tyrannies and the constitutional aristocracy an oligarchy, and demanded the transformation of both into constitutional democracies.*

*The agitation against these forms of government thus had to go a step further than demanding written constitutions. These had, in many states, been granted, but had failed to satisfy. The demand now was for a combination of parliamentary constitutionalism (such as Britain already possessed) with the recognition of the sovereignty of the people and provision for its exercise (which she did not). Despite the measures taken at Carlsbad and Vienna, the twenties saw a rising tide of resentment on the continent against legitimist constitutional régimes, as well as against purely arbitrary governments, in Iberia, in Italy, in Latin America and in Germany, but it remained ineffective until the easy overthrow of Charles X (who had provokingly sought to return from legitimist constitutionalism to arbitrary rule) in France created a rift in the legitimist front which stimulated the whole of Europe. A number of rulers now found themselves unable to resist the setting up of parliamentary forms of government in negotiation with the representatives of the people, but they were usually still able to avoid any alienation of their sovereignty, and Metternich, in 1834, reinforced his veto upon any such tendency.*

*The July or Orleanist monarchy in France, though entirely*

on a negotiated basis, was itself a vague compromise which took the sovereignty away from the crown without expressly giving it to the people, and made possible a parliamentary régime without guaranteeing it against royal manipulation. Metternich regarded monarchy and popular sovereignty as irreconcilable, and the revised French Charter of 1831 sought to avoid this possible contradiction by saying as little as possible about either. The preamble of 1814 was suppressed, but nothing was put in its place. Thus the reign of Louis Philippe started in an atmosphere of doubt which only 1848 was able to dispel.

An even more vital blow to legitimism came when the Belgian people broke away from the united kingdom of the Netherlands to which they had been joined in 1815, and repudiated both the Dutch king and his legitimist constitution. They were able to safeguard the sovereignty of the people by first adopting a constitution in which it was expressly recognized, and only then calling to the throne a king of their own choice, whose powers were thus only those given him by the constitution. Sweden had produced a constitution by negotiation in 1809, but under it the king retained a share of the sovereign power. In Belgium he had none. The monarchy, formalized by convention and implication in Britain, was formalized by express constitutional statement in Belgium, whose constitution was both derivative and seminal to a high degree.

Metternich rightly regarded 1830 as the thin end of a wedge, remarking that the bourgeoisie, which led the movement everywhere, was never satisfied. In an absolute monarchy it demanded a representative system; where there were already representative institutions it demanded a guarantee of the rights of the citizen; and now, in England, which had both and more, it demanded electoral reform and a popular franchise. The popular franchise demanded in Britain was not adequately secured by the Reform Act of 1832, and would not have been imitated if it had been, but the era of legislative activity initiated in 1832, had far greater significance in transforming Britain and stimulating the world.



## CHAPTER XI

### EIGHTEEN THIRTY AND THE JULY MONARCHY IN FRANCE

VICTOR HUGO called 1830 a revolution stopped half-way, and it is true that the whirlwind was ridden and the storm directed, after the first excitements, by moderates whose waistcoats were relatively sober in hue and whose ideal was not the republic one and indivisible, the suffrage direct and universal and the people sovereign and irresistible, but merely the reduction of the monarchy to a position of subservience to the constitution, the raising of the Chamber of Deputies to the dignity of an effective legislative body, and the broadening of the franchise to give the vote to the lesser *bourgeoisie*.

“ A  
REVOLUTION  
STOPPED  
HALF-WAY ”

The intention was timid but the effect proved to be fundamental, as was the case with the English Revolution of 1688, another conservative movement to which that of 1830 in France bears a striking superficial resemblance. Both followed positive actions by a monarch that were regarded as violating the fundamental law of the country ; both were virtually bloodless ; both saw the throne, following the flight of the king, declared vacant *de facto* and *de jure* ; both saw an invitation to a near relative to the king, but not in the direct line of succession, to assume the throne ; both saw the fundamental law re-defined in certain important particulars by the legislature acting in a sovereign capacity without seeking any express sanction from the people ; both saw the new ruler accept his throne and constitutional position at the hands of the legislature without any attempt to assert absolute authority or the possession of undivided power in the state.

The principle of legitimism, as manifested by Louis XVIII and elaborated by Metternich, was dealt a three-fold blow from which it never recovered, by the French Revolution of 1830. The dynasty was changed from the direct line, the new king received his throne from the representatives of the people and he accepted the position of a limited monarch. The revision of the Charter which it brought about did not specifically set up a system of parliamentary government similar to that obtaining in Britain, but it allowed such a system to develop, whereas the Charter in its original form did not. King, peers and deputies were placed in a position of equality in the legislative sphere. The foundations of partnership in government were thus laid. The possibilities of *liaison* already existed in the ability of the king's ministers to be members of either house and the potentialities of a parliamentary executive were thus implicit. That the Orleanist monarchy did not produce a satisfactory consummation was due to lack of will rather than to the absence of constitutional ways and means.

The detailed alterations to the Charter were not extensive, for outside its preamble the 1814 document had already etched deeply into the alleged absolutism of the restored Bourbons. The change was in emphasis rather than in structure.

The preamble was, of course, entirely suppressed as an insult to the dignity of the French people. The declaration of rights was amended to declare the Roman Catholic religion that of the majority, but not the official religion in France as it had been in 1814 (article 6), and to state that the censor could never be re-established (article 7). The clerical reaction and censorship of the Restoration sufficiently explain these changes. The section dealing with the form of government in general terms, had inserted in it an express denial of any royal dispensing or suspend-

A BLOW TO  
LEGITIMISM

ALTERATIONS  
TO CHARTER

ing power over legislation (article 13), while in legislation the initiative was given to the peers and deputies as well as to the king, and all taxation was first to be voted by the Chamber of Deputies (article 15). The creation of hereditary peers was still permitted (article 23), subject to review in 1831 (when the hereditary peerage was abolished) and all Charles X's nominations and creations of peers were declared null and void (article 68). The minimum age for deputies was reduced from forty to thirty and of voters from thirty to twenty-five (articles 32 and 34), and though elections were to remain indirect, the presidents of the electoral colleges of the departments were to be chosen by the voters instead of by the king (article 35). The legislative term was again reduced to five years (article 31). The franchise was no longer specifically limited to persons paying a certain minimum annual direct tax, but was left to be defined by a separate electoral law. This law, passed on April 19, 1831, reduced the minimum for electors to 200 francs per annum, and for deputies to 500 francs, allowed certain special classes (such as members of the *Institut* and some retired officers of the armed forces) the vote without this qualification, and added to the kinds of tax that could be counted toward eligibility. This was by no means a democratic franchise, but it did mean a great increase in the number of voters, and enfranchised the greater part of the lesser *bourgeoisie*, though not (with rare exceptions) the employed workers. Like that of 1832 in Britain, it was an enfranchisement stopped half-way, and left many dissatisfied, though it rallied enough support to give immediate stability to the new *régime*. As a further sop to the middle class, the Charter in its revised form (to which the king had to swear his loyalty at his accession) was placed under the special protection of the national guard (article 66), while as a gesture toward the nationalism of the great revolution the *tricolor* cockade and flag were restored (article 67).

ELECTORAL  
LAW OF 1831



This was also, of course, a tribute to the memory of Philippe "Égalité", the new king's father, as well as a symbolic denial of legitimism.

The electoral law of 1831 was one of a series of special laws which article 69 of the revised Charter had declared should be passed as soon as possible. With the exception of a law on the responsibility of ministers, this legislative programme was carried out.

The form of government existing in France under the Orleanist monarchy thus satisfied certain immediate needs,

but the constitutional rigidity of the *régime*, following its initial reforms, militated against its permanence in a rapidly changing world.

Wedded as firmly to "Finality" as were the great party leaders in England after 1832 who were their contemporaries, Louis Philippe and his ministers produced nothing comparable to the reforming achievements outside the constitutional sphere which were the saving grace of the Whigs between 1832 and 1841 and the Tories between 1841 and 1846. The system of the revised Charter therefore took on more and more the appearance of something transitional and (since the government resisted change) transitory. The *régime* also suffered from a confusion of ideas as to the exact nature of the Orleans monarchy. Was it truly limited to the extent that a king who could do no wrong should do nothing, or did it leave scope for a forward policy on the part of the crown? Louis Philippe knew that he could not be a James II or a Charles X, but was he to be a George III (early period) or a William IV? Was he to "be a king" or a figure-head?

The constitutional history of the Orleans monarchy reflects this dilemma. After the first enthusiasms for the

new *régime* had died away, an opposition rapidly crystallized both in and out of the legislature. The legitimists and the republicans were avowed enemies of the *régime* from the first,

but from about 1835 onward, the hitherto more friendly parties of the right and left centre tended to criticize and to oppose the crown, particularly in its policy of packing the legislature with office-holders dependent for their positions on the royal goodwill. While the leader of the right centre, Guizot, held that "The throne should not be an empty chair", whereas Thiers, the leader of the left centre, declared "The king reigns but he does not govern", they both, when out of office, opposed this tendency on the part of Louis Philippe to operate on a narrow basis of subservient interests rather than on a broader basis of ministers who (as they thought they did) possessed the confidence of the people. In 1840 the reform agitation led by Thiers came to a head in the demand for a reduction of the franchise qualification for voters from 200 to 100 francs, while more radical elements (like the Chartists in England) cried for nothing less than universal manhood suffrage. At the same time the republicans, whose opposition had been exclusively political in 1830, were beginning to adhere to the new socialistic programmes and to talk of social as well as political revolution. The revival of Bonapartist sentiment, despite the *opéra bouffe* tactics of the young Louis Napoleon, provided an additional irritant, and Louis Philippe weakly furthered its growth by assisting in the deification of the first Napoleon by the reburial at the Invalides in 1840.

The ministry of Guizot from 1840 to 1848 was to lead to disaster. The brilliant mind of this "historian blind to all the lessons of history" proved ill-adapted to the task of piloting the Orleanist monarchy into calmer waters. "Finality" at home, combined with a disastrous foreign policy, helped to hasten the end. The affair of the reform banquets brought matters to a head, but many factors, some of them of long standing, were at work undermining the *régime*, which seemed unable to do anything that would improve its position. The indecisiveness of the Charter of 1830 as a

THE  
MINISTRY  
OF GUIZOT

form of government, rendered it something not worth preserving when the crisis came. Respect for it had not only been removed by events, but also by a series of powerful literary and theoretical attacks, all the more potent because they were rarely direct ; they did not so much belittle the Charter as praise other constitutions and other ideals. The Bonapartist manifesto *Les Idées napoléoniennes* appeared in 1838 to remind France of the grandeur without calling her attention to the servitude of the era of Napoleon I, as contrasted with the prosaic Whiggism of Louis Philippe, but a far greater work, Tocqueville's *De la démocratie en Amérique*, had been published in 1835 to provide data, for those who cared to draw such conclusions, in support of more liberal institutions than France then possessed, and in opposition to " Finality ", while in 1847, as a deliberate nail in the Orleanist coffin, Lamartine produced his memorable *Histoire des Girondins*, a monument to French men and women who had known how to live, and even better how to die, for ideals rather than for percentages, who had sought to govern France with warm hearts rather than in cold blood, and who shared only their wrong-headedness with the *régime* of Louis Philippe. More directly, a radical critic, Louis Blanc, had castigated the government of the years between 1830 and 1840 in his *Histoire de dix ans*, published in 1842, while other socialist writers, such as Prudhon, Fourier and St. Simon, were turning men's eyes towards new heavens and new earths of which the philosophy of Louis Philippe and Guizot did not dream. Nor (among the intelligentsia at least) was Comte, who completed his *Course of Positive Philosophy* in 1842, without a disturbing effect. The imaginative literature of the period tended also to be in rather than of the reign of Louis Philippe.

The *régime* of Louis Philippe attempted to do far too many things by halves, and in the end it fell to pieces

LITERARY AND  
PHILOSOPHICAL  
ATTACKS

almost by force of habit before the first really determined act of active resistance. On February 24, 1848, Louis Philippe, like Charles X before him, fled the country. A republic was proclaimed, a provisional government set up, and the constitutional Charter disappeared. Charles had fallen through tampering with it and Louis Philippe through leaving it alone. It had outlived its usefulness, and only to the more intransigent of German and Italian princes did it, in 1848, still appear to be modern.

THE  
DÉBÂCLE  
OF 1848

## CHAPTER XII

### EIGHTEEN THIRTY-ONE AND THE "MODEL" STATE OF BELGIUM

THOUGH a strict regard for the principle of legitimism would have caused the southern Netherlands to be handed back to Austria, they were, in 1815, joined to the northern Provinces to form, for strategic and economic reasons, the united kingdom of the Netherlands. This ingenious arrangement, perpetuating the link which had bound all the Netherlands under one sovereignty (as departments of France since 1810), not only set up a buffer state of considerable proportions next to France on the north-east, and provided a solution by liquidation of the perennial problem of the navigation of the Scheldt, but it also raised William of Orange, the last Staatholder of the United Provinces, to the status of a king, as William I of the newly united kingdom of the Netherlands.

Already proclaimed in 1814 sovereign prince of the territory of which he had previously been Staatholder, William had presented a draft constitution to the Dutch notables, and they had accepted it by an overwhelming majority. When the southern Netherlands were added to his dominions in 1815 and the kingly title conferred, he presented the same document, altered only to make it applicable to the united territory of the whole kingdom, to the Belgian or southern assembly of notables. He persisted in imposing it, without further amendment, as the fundamental law of the country, and promulgated it as such on August 24, 1815, despite an adverse vote and many individual protests of the Belgian notables, declaring that

THE NETHER-  
LANDS UNITED  
AS A KINGDOM

FUNDAMENTAL  
LAW OF 1815

the very existence of the new monarchy depended on its acceptance as it was. By counting all non-voters (and there were many absentees) as in favour of the fundamental law, he was able to assert that the Belgians had accepted it.

This was not a very auspicious beginning, and, quite apart from its merits or demerits as a constitution, this fundamental law of 1815 was resented from the first by the Belgians for the way in which it had been imposed upon them. But the Dutch too, under it, had to content themselves with a constitutional system of the narrow legitimist type. The fundamental law was granted by the king, not made by the people, and it was revocable by him and at his pleasure ; he could legislate by decree ; he could suspend the rights guaranteed ; ministers were responsible to him alone. Of special significance to the Belgians was the equal representation given to Dutch and Belgians in the States-General, though the Belgians were half as numerous again in the kingdom as the Dutch, and the equality and toleration to all creeds (with no established church) accorded in matters of religion. The Belgian opposition was thus both clerical and liberal. The bishops and clergy of the Roman Catholic church, of which the great majority of the Belgian people were members, felt themselves unable to accept the religious clauses of the fundamental law, while the unfair system of representation violated liberal principles, and both provisions affronted and fostered the spirit of nationality now developing in the Belgian provinces following their release from French domination.

THE BELGIAN  
OPPOSITION

A rigid and obtuse interpretation of the fundamental law on the part of the Dutch king and his government made matters worse. In the civil service, in the assumption of debts, in the use of languages, and in various other ways, the northern Dutch tended to be favoured as against the southern Belgians. Finally, in 1830, emboldened by

events in France, the Belgians proceeded from protests to riots and from riots to revolution. A provisional government was set up in Brussels in defiance of the authority of William, and a national congress was assembled, consisting of two hundred members elected by voters possessing taxpaying qualifications prescribed by the provisional government, plus certain professional representatives. Out of a population of four million there were only 44,000 voters for this national congress, which proved, as might have been expected, to be a conservative body. The idea of setting up a republic was sternly voted down by 174 votes to 13. The landowning classes and the prosperous *bourgeoisie* alone were represented, and the deputies chosen were predominantly people with experience in the law, in administration, and in the States-General between 1815 and 1830. The differences between "catholics" and "liberals" were temporarily forgotten in the enthusiasm for national liberation, while the Flemish question did not at this time arise because the politically articulate and represented classes were almost exclusively French speaking. It was this national congress that maintained Belgium's struggle for independence and which drew up the constitution of 1831.

This constitution has now survived for more than a century, and it has been very highly praised for its suitability for immediate purposes, for its proved stability, and as a contribution to the science of politics and government. One of its staunchest admirers, Henri Pirenne, sees it as the most typical of all that one could expect from a parliamentary and liberal constitution, as "*la charte par excellence des libertés modernes*". Fortunate in the moment of its birth, in the midst of the great reform debates in Britain, and able to take advantage of recent constitutional changes in France, and in the juxtaposition of political forces in Belgium that produced substantial

THE NATIONAL  
CONGRESS,  
1830

MERITS OF  
THE BELGIAN  
CONSTITUTION

agreement upon its fundamentals, the Belgian constitution does indeed possess many merits. Precise where the revised French Charter of 1830 had still remained vague, it recognizes without equivocation the full sovereignty of the people; it is not itself thought of as a sovereign document and sovereignty does not reside in some metaphysical harmonizing quality of the monarchy. It does indeed provide for a monarchical system of government, but it only differs from a republic because the headship of the state is for life and is hereditary; the king rules by no divine right and has no prerogatives; he is simply a person appointed to the headship of the state as king, to exercise prescribed powers given him under a constitution which is antecedent to him. "Le roi n'a d'autres pouvoirs que ceux que lui attribuent formellement la constitution et les lois particulières portées en vertu de la constitution même" (article 78). The legislature is bicameral, yet, departing from the almost universal European practice of the time, both houses are elected on a popular basis. Despite the strong individualism of the different provinces and the attempt only a generation earlier to form a "Belgian United States" on a loose confederate basis, the fact that the state set up is unitary is placed beyond question by the constitution. Though amendment is provided for and is by no means so complicated a process as in the United States of America, only two major alterations have been made to this constitution in over a hundred years.

The Belgian constitution of 1831 may, in general terms, be described as liberal (its guarantee of rights is very comprehensive), monarchical (in a purely formal way), as creating a bicameral legislature (with both houses elected), as carrying the separation of powers to considerable lengths, as being essentially undemocratic (by providing a franchise with a fairly high property qualification), and as proving to be rigid (despite reasonably easy amendment,

CHARACTER-  
ISTICS OF THE  
CONSTITUTION



change has been very slight) and extremely durable. Another admirer has said of it that it "compares favourably with the United States constitution in objectivity, simplicity, brevity and endurance".

The constitution contained 139 articles and was divided into eight sections : The territory and its divisions ("Belgium is divided into provinces" are the opening words); Belgian citizens and their rights; concerning powers (beginning "All powers emanate from the people", and containing subsections dealing with the legislature, the king and ministers, and the judiciary); finance; defence; general provisions; revision of the constitution; and, finally, transitional or temporary provisions. A supplementary section, like article 69 of the revised French Charter, lists a number of subjects upon which legislation is urgently necessary. These include the press, the judicial system, the finances, and provincial and communal government.

Section II, on the rights of the citizen, is similar in subject matter to the French declaration of rights of 1789, but it approaches the protection of rights from the more practical angle of simply forbidding (as had the American constitution and its first ten amendments) acts interfering with the exercise of these rights, and dispenses with a mere abstract statement of what they are. It differs most in content from the declaration of 1789 in according the right of association (article 20) and in its attitude toward religion. Generally its drafting provides an adequate protection of the rights mentioned, and in certain particulars it makes valuable contributions, notably in dealing with the liberty of the press and in the expression of opinion, when it is declared (article 18, clause 2) "Where the author is known and is domiciled in Belgium, the publisher, printer or distributor cannot be prosecuted", a provision preventing abuses and restraints such as still

THE  
TERRITORY  
AND ITS  
DIVISIONS

RIGHTS OF  
THE CITIZEN

exist in the press and libel laws of the United States, Britain and many other countries.

To meet specially complicated local situation, much care was taken over defining the relations of church and state, and without any state religion being actually established, the Roman Catholic church, whose representatives collaborated in the drafting, secured most valuable practical advantages, for its priests, though paid by the state, remained entirely independent of it. (The clergy of all faiths received state salaries, it is true, but the others were in numbers negligible.) No concessions were made by the church in the matter of ecclesiastical appointments or papal publications. (Again this was placed, by article 16, on a universal footing, but for the same reason the Roman Catholic church was the principal gainer.) The attempts of the Dutch king to interfere with Roman Catholic schools in Belgium is reflected in article 17, which declares: "Private instruction shall not be restricted; all measures interfering with it are forbidden", which left the church schools "in the most favourable position in any country where a church was not formally established." Because Roman Catholicism was in Belgium the religion of an overwhelming majority of the inhabitants, it was able to reap these considerable advantages from a declaration of rights that, by safeguarding religious liberty and freedom of worship (article 14) together with freedom not to worship (article 15) and prescribing a civil marriage ceremony (article 16), also satisfied liberal opinion. All this, of course, reflects the crossing and mingling for a brief period around 1830 of the liberal and catholic streams of thought and endeavour in Belgium, and the suppression of differences for national and constitutional purposes. The coalition was effected in 1828, and Lamennais became for a moment both a liberal and a nationalist, but after the papal encyclical "Mirari Vos", published in 1832, such a compromise

CHURCH  
AND STATE

would not have been possible. The questions of the position of the church and of religious instruction caused much subsequent controversy in Belgium, but the fact that they did not cause fundamental initial difficulties which might have wrecked the effort to frame a generally acceptable constitution in 1830 and 1831, was due to this temporary collaboration being possible. Seldom has the hour been so kind to constitution makers.

The division of powers between the two houses of the legislature was strictly carried out, and the members of both were elected by the same voters in the various provinces, but the senators were prescribed a higher minimum age and tax-paying qualification than the deputies, and the Senate, though elected for eight years instead of four, was only half as numerous as the lower house. Each house (as well as the king) was allowed to initiate legislation, and the consent of both was necessary for all legislation, though the initiative was (until 1921) reserved to the lower house on matters of state revenue and expenditure, and army contingents. Nevertheless, with only this slight theoretical advantage, the House of Representatives tended, in practice, to dominate. With the initiation of a parliamentary *régime*, ministers responsible to the House introduced government bills; the royal veto was never exercised; the courts were unable to declare legislation unconstitutional. The Senate came to accept a subordinate position; it could not sit except when the House was sitting (though there was no such restriction on the lower house) and as dissolution could be applied separately to either house, the fall of a ministry or its appeal to the country did not involve a dissolution of the Senate, which was thus pushed further and further into the background, with the fate of a ministry not dependent upon its attitude. The striking out in 1921, as a safeguard no longer considered necessary, of the clause giving the lower house the exclusive right to

SENATE AND  
HOUSE OF  
REPRE-  
SENTATIVES

initiate in financial and military matters may be regarded as recognition of the ineffectiveness of the Senate to challenge the preponderance of the House in the working of the constitution.

The king, as the formal head of the executive, could possess and exercise only those powers expressly given him by the constitution, and could act only through his ministers. The executive power was specifically subordinated to the law, but

MONARCHY  
COMPLETELY  
FORMALIZED

a right to issue ordinances was accorded. The provision of a regency or the filling of a vacancy on the throne was the province of the two houses of the legislature acting together. Thus did the Belgian constitution of 1831 complete the formalization of monarchy, and by reducing the sphere of the king to functions prescribed by the constitution and performed through ministers responsible to a popularly elected legislature, succeed in reconciling in a satisfactory and logical way the continued existence of monarchical institutions with the full recognition of the sovereignty of the people. The British constitution was felt rather than known to have bridged the same gulf, but in 1831, nobody (even in England) could quite explain how; the revised Charter of 1830 in France was capable of being interpreted in the same direction, but it was also capable of interpretation in quite different directions, and its vagueness was fatal; the Swedish constitution of 1809 had divided the sovereignty between king and people; only the Norwegian constitution of 1814 had previously worked out in terms of a fundamental law the implications of a monarchy truly limited, and the lesson of Norway's example was clouded by her remoteness and the fact that she had been forced to share a king and representation abroad with the more powerful Sweden, the very situation which (in a more onerous form) produced the Belgian rebellion against the Dutch king in 1830. For this reason it was Belgium and not Britain, France, Sweden or Norway, that became

the pattern and the prototype for constitutional monarchies everywhere during the century following 1831.

A PATTERN  
AND A  
PROTOTYPE

Herself borrowing freely from the institutions and constitutional practices of France, Britain and America to form the constitution of 1831, she has seen this constitution paid the compliment of imitation, both deliberate and unconscious, both successful and disastrous, in many different countries.

In devising a judicial system, the Belgians of 1831 were less happy than in defining and protecting the rights of the citizen. The law of Belgium remained

JUDICIAL  
SYSTEM A  
COMPROMISE

French in its basis and spirit, and the *Code Napoléon*, which had completely superseded older Belgian law during the French occupation, became the Belgian civil code, though a certain amount of Dutch law, notably in the commercial sphere, was retained from the period of the united kingdom. The independence of the judiciary was placed beyond a shadow of doubt and appointments were for life. Neither the power to interpret the constitution given to judges in the United States nor the power to interpret individual laws exercised by British judges, was permitted to Belgian judges. On the other hand, there was no comprehensive system of administrative law and administrative tribunals, such as existed in France, to remove from the sphere of the ordinary courts and judges the responsibility of officials and the relations between the citizen and the state. The principal weakness of the Belgian judicial system was a tendency to waver between the British principle of the rule of law and the French recognition of *droit administratif*. The loophole left by the wording of articles 92 and 93 of the constitution of 1831, tends to reduce the effectiveness of the citizen's remedy against abuses of his rights. This was a time when even French lawyers had not digested the full significance of the principle introduced by Bonaparte in the constitution of the year VIII (article 75), and long before British lawyers had been able to put the

rule of law in a clear light, and the Belgian constitution makers appeared to have thought it possible to have the best of both worlds by making one the rule, but retaining the other for application in exceptional circumstances. A certain confusion was the result. The courts cannot refuse to apply a law on the ground of its unconstitutionality, but they can refuse to apply orders or regulations of the central executive or of provincial or local authorities which they consider out of conformity with the law; officials can be sued in the ordinary courts without restriction, but the uncertainty of the situation has made the courts reluctant to take jurisdiction where official acts are concerned, despite the absence of competing administrative courts.

The constitution of 1831 could be amended by the two houses of the legislature first of all accepting a proposed amendment by simple majorities; the houses were then, by the fact of having accepted the amendment or amendments, automatically dissolved; a new election had to be held within forty days and then the new chambers had each to pass the proposed amendment by two-thirds majorities of at least two-thirds of the total membership of each house. Less cumbersome than amendment in the United States, this was nevertheless no easy process, and the fact that any legislature accepting a proposal for amendment *ipso facto* immediately terminated its own existence, was not an encouragement. Only twice in a century was this process carried through to its consummation, in the group of ten amendments to existing articles adopted in 1892, and in the related group of fourteen amendments and two new articles carried through between 1919 and 1921. In 1892, articles 1 (to allow for the annexation of the Congo State), 36 (exempting ministers from the need for re-election to the legislature upon appointment), 47 (giving manhood suffrage at the age of 25 and introducing a system of plural voting), 48 (providing for compulsory

PROCESS OF  
AMENDMENT

voting at elections), 52 (giving salaries, in addition to expenses, to members of the lower house), and 53-58 (altering the composition of the Senate), were amended. In 1919-21 the principal amendments were to articles 27 (making the two houses equal in financial and army legislation), 108 (allowing local communes to associate) and 47-56 (changing the electoral system and the organization of the legislature). Thus the principal amendments have been in the franchise and in the composition of the upper house, both being in the direction of democratization, and these have been hard won, being preceded by periods of violence and unsettled conditions (the strikes of 1892, and the war and German occupation of 1914-18).

The movement for the reform of the franchise has been intimately connected, as in Britain, with the working of

FRANCHISE  
REFORM  
AGITATION

the parliamentary system and with party politics. Belgium between 1831 and 1892 has been called "the classic land of *bourgeois* parliamentarism". During that period the limited suffrage was retained and a two-party system set the pendulum swinging in long rhythmic sweeps. The electoral system of 1831 was very conservative, limiting the suffrage for the lower house to even fewer voters than the provisional government had enfranchised for electing the national congress. A liberal agitation in 1848 caused a slight increase in the number of voters, and by a flat-rate tax qualification being adopted, 79,000 were enfranchised instead of 46,000, out of a population of four million; but further reform was resisted for forty years and by 1890 there were only 133,000 voters out of a population of six million. When the catholic ministry in power bowed before the agitation and strikes of 1891-92, a compromise with more radical demands gave unrestricted manhood suffrage at the age of twenty-five, but allowed additional votes to substantial taxpayers and landowners, as well as to university graduates and certain classes of professional men, though no one man was to possess

more than three votes. The same franchise, except that the minimum age for voting was thirty, was introduced for electing the Senate. This meant that at one stroke the number of voters in the country was multiplied by ten, and the swing of the pendulum was rudely shaken by the appearance of a socialist party (with 28 representatives in the first chamber elected on the new basis) and the decline of the liberal party (from 60 members to 20 in the same election). In 1899, proportional representation was introduced without a constitutional amendment being needed, and the stability of the traditional parliamentary system was maintained for another twenty years by the catholics retaining control of the government against the weakened liberal and growing socialist party.

The suspension of political life in the country caused by the German occupation was ended by the reassembly at the end of November 1918 of the last legislature, though its mandate had by that time expired. Judging it expedient at such a time of disorganization and emergency to ignore the strict requirements of the constitution, the houses unanimously passed, and the king approved, a law enfranchising for the purposes of a new election all men over twenty-one years of age, subject only to a residential qualification of six months, and granting the vote to women to a limited extent. The system of plural voting was abolished. The "Union sacrée" of the three parties which carried this law, also secured its regular adoption as part of the constitution after the elections. Under the amended constitution, the universal manhood suffrage at twenty-one with one-man-one-vote was ratified, but women had to be content with the vote in municipal elections. The effect of the new franchise and voting arrangements was to complete the disruption of the old party system and to stop the pendulum altogether. After the breakdown of the "Union sacrée" in 1921, caused

EFFECT OF  
UNIVERSAL  
MANHOOD  
SUFFRAGE



by the withdrawal of the socialist members of the government coalition, the government was carried on by a coalition of catholics and liberals. Since that time it has been impossible for any one party to achieve a stable majority, and a series of coalition governments of varying complexions has been formed, rather as in France.

The Senate, which, like so many second chambers, had been one of the less satisfactory parts of the constitution from the first, was, in 1921, again reorganized.

SENATE  
REFORM

Between 1893 and 1921 the Senate had been in part directly elected by the people voting in the separate provinces, and in part indirectly elected by the provincial councils. In 1921 a third category, indirect election by the Senate itself, was added, and new voting qualifications were introduced in an attempt to make the Senate more representative of the nation, while its dignity was enhanced by according it complete theoretical equality in legislation with the lower house. But despite all this it has remained a relatively unimportant body, in no way comparable in its constructive or destructive possibilities to the French Senate.

The position of the monarchy, so precisely defined in 1831, has fluctuated only with the popularity and character of the reigning sovereign, and this only caused constitutional repercussions when Leopold II presented Belgium with a colonial problem in a particularly embarrassing form. The Belgian constitution appeared to

COHESIVE AND  
DISRUPTIVE  
FACTORS

work excellently when party divisions were clear cut and few, as between 1831 and 1846 (the period of consolidation during which the liberal-catholic national coalition managed to hold together except for a brief liberal interlude in 1840-41) and between 1847 and 1870 (when the liberals were continuously in power except between 1855 and 1857). Even the "lutte scolaire" of 1870-84 was fought out according to the best rules of two-party government, though the bitterness of the conflict over the liberal education law

of 1879 tended to shake the whole system, and then the country settled down to thirty years (1884-1914) of control by the catholic party. Following the wartime suspension of activities and the "Union sacrée" of parties for purposes of reconstruction, the catholic party found itself deprived of its clear majority by the working of the new franchise laws, and the period of struggling groups already referred to, with catholic-socialist rivalry predominating, was initiated. The growing significance and activity of the Flemish movement has in recent years tended to make Belgium resemble even less the "classic land of *bourgeois* parliamentarism" that she is claimed once to have been, but despite even more alarming political apparitions of late, the constitution of 1831 continues to serve.

## CHAPTER XIII

### EIGHTEEN THIRTY-TWO AND LEGISLATIVE REFORM IN BRITAIN

THE British constitution, once the envy and the despair of continental theorists and reformers, was, by the end of the eighteenth century, in the doldrums.

BRITISH  
CONSTITUTION  
IN THE  
DOLDRUMS      The mixture that Montesquieu had prescribed in 1748 for preserving liberty, did not appear to be acting as before when the

American colonists thirty years later rejected it, in order, they asserted, to secure their freedom from tyranny. How could that quiescence of monarchy supposedly guaranteed by the revolution settlement be squared with the acceptance by the House of Commons of Dunning's motion, in 1780, to the effect that "the influence of the crown has increased, is increasing and ought to be diminished"? Where was the boasted liberty of the subject when, in the seventeen nineties, the government of the younger Pitt (alarmed at the spread from France of demands for wider liberties than the British system had ever countenanced), suspended *Habeas Corpus* and passed a whole series of repressive acts?

No wonder the world turned its attention from this old vintage (which nobody had ever properly succeeded in bottling) to the heady wines with their brand-new labels provided by the American and French constitution makers and by Napoleon Bonaparte. Only where British influence was not only strong, but reinforced by redcoats or wooden walls (as in Portugal, Spain and Sicily), did British institutions provide much inspiration abroad in the period between 1789 and 1814. From 1814 onward Europe again began to sip at the ancient fount, for had

not Britain succeeded in warding off both revolution and its self-styled heir, the greatest conqueror of modern times, and was she not rapidly becoming the workshop as well as the shopkeeper of the world? Even if her political institutions had proved insufficiently elastic to retain the thirteen colonies, the London Corresponding Society and the gold standard, though they had provoked unavailing demands for "The Rights of Man", "The Rights of Woman" and "Political Justice", had let Cobbett and Burdett go to jail and Addington become Prime Minister, had left Old Sarum its two members and bereft Ireland of her Parliament, she had achieved wealth and Waterloo. The gold standard and *Habeas Corpus* were restored, even though they were accompanied by the Corn Law and the Six Acts. Cobbett was still writing polemics, Burdett was still winning elections. The era of Lord Liverpool may have been "The Age of Bronze" but beside it the years around the turn of the century had been palaeolithic. The prestige of British institutions was beginning to experience a new dawn in these post-war days when Jacobinism as well as Caesarism had been liquidated, and to be middle-aged and still alive was a fair substitute for heaven.

RENEWED  
PRESTIGE  
AFTER 1814

The British form of government, which even legitimist monarchs were prepared to make use of in drawing up their charters, was, in 1814, though the opposite of democratic, essentially free. "English legitimism was a totally different thing from continental legitimism." The power and even the significance of the monarchy had sunk to the shadow that the "old, mad, blind, despised and dying king" was of a man. Legitimism in England was the rule of the aristocracy, which, through its control of both houses of Parliament and of the machinery of the executive, continued to dominate the country, though it no longer remained impervious to the pressure of public opinion.

LEGITIMISM  
IN ENGLAND

It has been pointed out that the same institutions which were favourable to liberty in 1688, when the king was still asserting his claim to sovereignty, had become unfavourable to liberty by 1815, when the people were beginning to assert a like claim, and that it was now against the people and not against royal tyranny that the governing class represented by justices of the peace, members of Parliament and cabinet ministers, were maintaining their independence and their legitimist claims to rule. Nevertheless, it has been concluded that the oligarchy was tempered with genuine elements of liberty, though the Tory reaction had many years yet to run. To the wonder (and at times to the disgust) of foreigners, it was a country "governed without police". The Riot Act and an increasingly severe penal code, both thoughtfully provided by the eighteenth century, still left British magistrates without really effective means of repression, even if the will was not wanting. In addition to not being a *Polizeistaat*, Britain also lacked those other instruments of tyranny, a centralized bureaucratic system and a large standing army. Her navy, though the most powerful in the world, presented no danger to public liberty at home, and indeed, as the mutinies at the Nore had indicated, had potentialities in the opposite

ABSENCE OF A  
BUREAUCRACY

direction. It was (says Halévy) owing to the absence of a bureaucratic state that "the progress of democratic institutions during the nineteenth century necessarily followed, in England, a course very different from that which it was to follow in the other countries of Europe. On the Continent the bureaucratic state was already in being and nothing more was required than the transference to other hands of this pre-existent machinery and its employment for novel purposes. In England the machinery itself had to be created."

Britain being in this respect behind and not in advance of certain other countries, it was not on the administrative

side of government that she provided inspiration. It was the nature of her limited monarchy and of her parliamentary system that commanded respect and inspired emulation. The one had been stabilized by the end of the seventeenth century, and the other had become clearly defined by the end of the eighteenth. The limited monarchy, certain outlines of which had been sketched in as early as the fourteenth century, was, by the beginning of the nineteenth century, worked out completely. Formal executive power remained with the king, the supreme legislative power was vested in Parliament, and actual executive power was now exercised by a cabinet which consisted of ministers of the king who were at the same time members of the House of Commons or of the Lords. The cabinet could therefore be held responsible to Parliament for its actions as the king's ministry, because it depended for its continued existence upon the co-operation of a majority in Parliament and was normally selected from the adherents of the political party which possessed such a majority. The Prime Minister was appointed by the king, but selected his own colleagues, who acted with him as a body and were collectively responsible with him. All this had been worked out, even if its full implications were as yet understood by few, by the time of the younger Pitt.

LIMITED  
MONARCHY  
AND PARLIA-  
MENTARY  
EXECUTIVE

The four salient features of this constitution were, therefore, at the beginning of the nineteenth century : a limited monarchy, dependent upon and defined by statute, possessing formal executive power only ; a supreme legislative body, in Parliament, with the House of Commons as the predominant partner in legislation ; a cabinet system of government, providing a real executive and linking king with Parliament in the constitution ; the rule of law, implying the absence of arbitrary power on the part of the government, the competence of ordinary

SALIENT  
FEATURES OF  
BRITISH  
CONSTITUTION

laws administered by ordinary tribunals for all cases, and the emergence of general rules of the constitution from ordinary legislative processes.

As the whole edifice had come to rest upon the ultimate supremacy in the state of the actions of an assembly elected by the people, that is, upon a representative system of government, its key would appear to be the nature of this system. But, again to baffle the foreigner, it was in the representative system that development had most conspicuously lagged in England ever since the fifteenth century, so that it remained the main task of the nineteenth century (apart from creating an efficient bureaucratic hierarchy) not to devise any new political institutions or institutional machinery, not to define afresh the essential nature of the British constitution, but to bring up to date and more into harmony with the new social and economic structure of the country this representative system which had not been amended in any fundamental way since 1430, and which, in the seventeenth and eighteenth centuries, had in certain directions even been narrowed, quite apart from failing to respond to the considerable movement and increase of population during that period.

In the seventeenth century the Commonwealth had attempted to modernize the representative system (though not to democratize it), but the Protectorate and the Restoration had undone its work, and the great parties which held or disputed power in the state in the eighteenth century had tended to regard the reform of the representative system as a purely academic problem until, in the reign of George III, they found certain of its archaisms being turned to account against them by the king and his friends. The acts of 1763 (regulating the franchise of honorary borough freemen) and 1770 (reforming the procedure for the hearing of election petitions by the House of Commons) were followed by the

ANTIQUATED  
REPRE-  
SENTATIVE  
SYSTEM

much more purposeful legislation of 1782 (barring government contractors from becoming members of Parliament, and depriving revenue officers of the vote), of 1786 (demanding a six months' residence qualification of scot and lot electors) and 1788 (requiring country electors to be registered a month before they could vote), while in the latter year the act of 1729, which had made it impossible to vary the franchise piecemeal in the different constituencies, was repealed. Even more radical, as the country re-emerged from the depths of the anti-Jacobin terror, was the act against electoral corruption forced by the Whig opposition upon a reluctant government in 1809, following the unsavoury Duke of York scandal. It was this act that drove the buying and selling of seats in Parliament underground, and materially reduced the traffic.

PIECEMEAL  
REFORM IN  
EIGHTEENTH  
CENTURY

This interest in the reform of the franchise, or rather in the removal of the most scandalous abuses of the unreformed franchise, though only rarely inspired by any high motives and though unaccompanied by any comprehensive scheme of enfranchisement or redistribution of seats, shows that the *ancien régime* was beginning to crumble in England long before 1832, and did not then suffer a sudden *débâcle* comparable to that of the French in 1789. Other signs, such as the abolition of the slave trade in 1807, the repeal of the combination laws in 1825 and Roman Catholic emancipation in 1829, point to the same process of erosion in other fields. Yet a colossal complacency still continued up to the very eve of the reform era of the thirties to suffuse the countenance of the ruling class. The system of government might be "mixed", as a clever foreigner had pointed out, but for all its confusion (which he had not noticed) it appeared to work better than these new forms of government which one ordered like new suits of clothes, only to outgrow them or find them out of fashion

OTHER SIGNS  
OF CHANGE



as soon as worn. The radicals might declare that the constitution had become stultified by the interests of the crown and the two Houses of Parliament having become identical, so that they no longer checked and balanced each other in the interests of the people, and Bentham might riddle the complacent antiquarianism of Blackstone in his *Fragment on Government* and then point toward the light in his *Catechism of Parliamentary Reform*, but Lord Eldon was on the woolsack and all well with the world. "In England the machine goes on almost of itself and therefore a very bad driver may manage it tolerably well", was the comforting thought of Lord Redesdale in 1821, while as late as 1830 the Duke of Wellington remained "thoroughly convinced that the country possesses at the present moment a legislature which answers all the good purposes of legislation, and this to a greater degree than any legislature ever has answered in any country whatever".

It was as much the fact that any reform agitation could break through this magnificent complacency, as the actual alteration of the franchise and redistribution of seats, that makes the British Reform Act of 1832 a landmark and an inspiration. In itself it was a most tentative measure, increasing the number of voters in the country only by about fifty per cent. A common borough franchise was prescribed (all occupiers of premises of the annual value of ten pounds) and tenants paying fifty pounds per annum were enfranchised in the counties in addition to the old forty shilling freeholders (to whom were now also added forty shilling lease and copyholders). Thus the picturesque hotchpotch of potwalloper, scot and lot, burgage, corporation and freeman borough franchises disappeared, while fifty-six rotten boroughs lost both their members and thirty lost one each. Twenty-two towns previously unrepresented received two members each and twenty others one each, while the county

THE REFORM  
ACT OF 1832

members were increased by sixty-five. That was all, and it made no immediate difference to the type or class of member returned to Parliament. The upstart Benjamin Disraeli twisted the tail of the Red Lion of Wycombe to no effect in 1832, but William Ewart Gladstone (like Robert Peel, a generation removed from trade) entered the Commons without effort in the same year, through the traditional door of noble patronage. The property qualification for members remained, and they were unpaid; the open hustings remained; redistribution of seats had been incomplete and unscientific; the great majority of adult males remained unenfranchised. Yet this pale measure of parliamentary reform had been secured only after a popular agitation of unparalleled activity over a period of years, and when it came it was declared to be "final", and remained so for thirty-five years.

This hard-won and unsatisfactory Reform Act of 1832 was nevertheless of great and immediate constitutional importance for Great Britain and not without significance elsewhere, for, quite apart from its effect upon the franchise, it opened the floodgates of legislation at Westminster and converted a tiny trickle of statutes into a mighty torrent that has never since shown any signs of abating. Ever since the spate of law-making by statute in the days of Edward I, when Parliament was young and unformed, legislation through Parliament had come intermittently, and law made in other ways had often overshadowed it. Although by the beginning of the eighteenth century the supremacy of Parliament in the constitution had been established, the Parliaments of that century did not use their new supremacy to legislate actively. It was a period of relative legislative quiescence at Westminster, a period of decentralization in which all that could be left to local bodies was left to them. The courts of Quarter Session have been described as "genuine legislatures" at this time, and it has been remarked that

FLOODGATES  
OF  
LEGISLATION  
OPENED

piece by piece they built up a complete new poor law quite unchecked and unregulated by Parliament until well into the nineteenth century. The county magistrates, who manned the courts of Petty and Quarter Sessions, united, in their different capacities, judicial, executive and legislative power (and in his *Esprit des lois* they received no mention from Montesquieu). "The justices of the peace judged, administered and legislated, and to their hands the central government abandoned the greater part of local government."

From 1832 onward the "period of legislative quiescence" came to an end, and the central government gathered back into its hands the threads of control over

local affairs. Armed with a philosophy and a programme of law reform by the legislative method by Bentham and his school, the first reformed Parliament passed the Municipal Corporations Act, the Poor Law Amendment Act and the Factory Act, all three of vital importance in local affairs, and it and its successors followed them up with a mass of similar legislation. The character of legislation might change with different administrations, but its flow never slackened. Parliamentary reform, as Bentham had foretold, was the prelude to a colossal new activity in parliamentary legislation, first of all attempting to catch up with the many changes that had taken place unheeded and unregulated by the quiescent unreformed Parliaments, and later taking the lead itself to effect fundamental changes.

Beside this result the mere fact of a fifty per cent increase in the number of voters and a belated and partial redistribution of seats was almost insignificant in Britain, and it was certainly far less significant to the rest of the world. The unreformed British franchise was already far wider than any European country that sought to adopt a parliamentary system of government before 1832 (or indeed for a good time after) would have considered. "Not a single one would have dared to admit so wide an

A PRO-  
GRAMME OF  
LAW REFORM

electorate." The Swedish constitution of 1809, the Spanish of 1812, the Norwegian of 1814, the French *Charte* of 1814, the Netherland and Polish of 1815 and the various German constitutions issued between 1816 and 1820, adopted a much narrower franchise, and those of the revised French *Charte* of 1830, the Belgian constitution of 1831 and of the German states of the years 1831-34 (Hanover included) still remained narrower in proportion to population than the British unreformed franchise, though the system they adopted was more uniform than the British (it could hardly have been less) and none of them had anything so narrow as the franchise in some of the British corporation boroughs. Even the Sicilian constitution of 1812, which mimicked the British constitution in almost every other respect (having a limited monarchy, a House of Lords with peers spiritual and temporal, and a House of Commons with county and town members, ministers responsible to the legislature, a summoning of Parliament every year, predominance of the Commons in finance and a jury system "entirely according to the English custom") shrank from anything as wide as a forty shilling freehold, or a potwalloper or scot and lot franchise. Indeed, with her reformed franchise, Britain continued to stand, with regard to the breadth of her representative system, quite apart from the other constitutional countries of the old world, until 1848 brought a temporary adoption of universal manhood suffrage into certain continental states, though the Chartist petition failed to shake the apostles of "Finality" in Britain. But the continent was interested less in the British franchise than in her Parliament (however elected), its procedure, its supremacy, and its legislative activity. Herein lay the wider significance of 1832.

THE  
FRANCHISE  
IN BRITAIN  
AND ABROAD

WIDER  
SIGNIFICANCE  
OF 1832



PART V

NATIONAL CONSTITUTIONS —  
THE MOSAIC STATE

## *National Constitutions — The Mosaic State*

*French constitution-making and British parliamentary reform were not primarily expressions of a feeling of national unity or consolidation, for in those two countries such unity and consolidation was already taken for granted. In France and in Britain (Ireland always excepted) the state and the nation, the one a projection of the government and the other of the people, had achieved a high enough degree of coincidence for the term "nation-state" to be applicable to both countries even before the nineteenth century commenced. Development was in the direction of giving more emphasis to the national aspect (Louis Philippe became king of the French, whereas Charles X had been king of France, while the reform of 1832 began the process of making Parliament more representative of the British nation as a whole) but the juxtaposition already existed.*

*This was not so clearly the case elsewhere before the middle of the nineteenth century. Even the United States of America, having barely escaped dissolving into thirteen different nations, was showing tendencies toward splitting into two, but she did have her federal constitution to exercise a powerful pressure in the opposite direction. Elsewhere consolidation was less of a reality. Spanish America, on achieving independence, had split into a score of separate nations, and the idea of a United States of Latin America did not prosper. Switzerland had returned in 1815 to a loose confederation of sovereign states from her phase of imposed unity and federalism ; Germany also was a league of sovereign states, and still far from being a nation ; Italy was a mass of sovereignties and dependencies of foreign powers without even a confederate bond. The process of splitting a new nation off from an existing state and then giving its independent cohesiveness constitutional expression (as in Belgium), was a simpler one than forging a bond of national sentiment and interest between a mosaic of states, some of which considered themselves nation-states in their own right, but the revolutions of 1848 made it possible to attempt the harder task.*

## CHAPTER XIV

### ITALIAN NATIONALISM AND THE PIEDMONTESE CONSTITUTION OF 1848

THE *Risorgimento* in Italy, greatly stimulated by the impact of Napoleon Bonaparte, manifested itself in grandiose manner when, in May 1814, the crown of Italy was offered to Napoleon in exile at Elba, on the condition that he should renounce his conquests and rule as a constitutional monarch through a parliament. But this project was thwarted, as was Joachim Murat's assertion in his proclamation at Rimini a year later to the effect that he would give Italy independence, unity and a free constitution, by the decision of the powers at Vienna to parcel out Italy once again among the rulers who had held sway there before 1795. Legitimism must be served, but not to the extent of restoring the two ancient republics of Venice and Genoa. The name republic was anathema at Vienna, and as both had already been extinguished by Napoleon, there was no move to revive them as independent entities. The territory of Genoa was handed over to the king of Sardinia and that of Venice to Austria. The Papal States were restored in their entirety, and in the remainder of Italy "kings crept out again to feel the sun".

VIENNA  
CONGRESS  
AND  
THE "RI-  
SORGIMENTO"

From the Alps to Etna not a constitution of any sort disturbed the complacency of the restored despots of Italy after 1815, but popular discontent found expression in secret organizations such as the *Carbonari*, and in 1820 and 1821 came into the open in insurrections at both ends of the peninsula. In Naples the Spanish constitution

REVOLT AND  
REPRESSION



of 1812 was demanded and forced upon the king for a few months, while in Piedmont the king abdicated and the regent was persuaded to proclaim that same document, so fatally fascinating to Latin liberals, but here too it was soon swept aside. In Italy as well as in Iberia the Holy Alliance was prepared to maintain the sacred principle of legitimism "by peaceful means, and if need be, by arms", and in Italy Austrian armies were always ready to give effect to the Troppau protocol. When, a decade later, the standard of revolt against papal rule was raised in the Romagna, and a constitution demanded, these ever-ready agents of repression were again effectively employed.

From 1831 onward, open insurrection was abandoned as temporarily a hopeless means of bringing to Italy some form of constitutional government, and in the Young Italy movement some of her liberals began to explore the possibility of giving to the *Risorgimento* a double edge, combining the demand for constitutional government with that for the expulsion of the foreigner and the unification of Italy as a nation-state. Mazzini's *Giovane Italia* appeared in 1831, the year of the unsuccessful rising in the Romagna, and he and his followers advocated a unitary republic of all Italy. Less radical reformers favoured a league of princes under the presidency of the Pope, and Gioberti's *Primato*, appearing in 1843, developed this "Neo-Guelph" theme as a catholic, federal and monarchical solution to the Italian constitutional problem, in opposition to the secular, unitary and republican solution of Young Italy. Nevertheless, it was recognized that the question of the expulsion of the Austrians, against whose interest it was for any national constitutional system to be created in Italy, should have priority over any such plans. Balbo's *Speranza d'Italia*, published in 1844, voiced this feeling and called upon king Charles Albert of Piedmont-Sardinia to draw the sword at the first opportune moment against

YOUNG ITALY  
AND THE  
NEO-GUELPHS

the Austrian domination. Italians became obsessed with this idea. It was "delenda est Carthago" over again. A scientific congress, meeting in 1846, became nothing more nor less than a national convention discussing ways and means of uniting Italy and expelling the Austrians, who were referred to euphemistically and to escape the notice of the censor as "the potato disease". In like manner a group of German scholars held the same year a congress supposed to be devoted to Germanistic studies, only to discuss German unification, constitutional government and Schleswig-Holstein.

In that year, too, events in Italy took an unexpected turn. "We were prepared for everything except a liberal Pope" said Metternich. Pius IX did indeed appear to have liberal leanings. He issued an amnesty and set up a council of state in his temporal dominions, and this was a start, even though he did appoint as Secretary of State a man of eighty-nine. For two years Pius IX was regarded, though he did not regard himself as such, not only as the Holy Father of the church but as the father of the political regeneration of Italy as well. His attitude gave such prestige to the Giobertian idea of a federation of princes under papal presidency, that even Mazzini declared himself willing to accept papal leadership.

But the march of events now took a much more decisive turn and soon was to dispel this dream. Political discontent in the kingdom of the two Sicilies had been added to by economic misery, and on January 12, 1848, a revolution carefully prepared in advance broke out in Sicily, paralyzed the authorities and restored the constitution of 1812. On April 18, a parliament elected under the terms of the constitution was assembled. Separation from Naples (or at least only a personal link with her through possession of the same monarch) was demanded, but later complete independence was proclaimed, the

"A LIBERAL  
POPE"

REVOLUTION  
AND CON-  
STITUTIONAL-  
ISM IN  
SICILY, 1848

throne declared vacant, and the constitution revised in January 1849 so as almost completely to extinguish the already partially formalized royal power in the state. The Duke of Genoa, invited to the throne, refused to be king in such circumstances, just as Frederick William IV of Prussia, at about the same time, refused a German crown at the hands of the Frankfurt parliament. A great many crowns were in the gutter in 1849, but it was not easy to find people who would pick one out, as Leopold of Belgium had done in 1831. Though Leopold, starting from the bottom, had already made good as a constitutional king (and was continuing to school his niece Victoria to be good as a constitutional queen), neither the descendants of Frederick the Great nor those of the great Hapsburgs and Bourbons were yet prepared to become the indentured servants of the state.

On the mainland the revolution broke out immediately after the Sicilian movement had begun, and the Spanish constitution of 1812, this time rather threadbare after the fiasco of 1821, was again demanded in Naples. Ferdinand II bowed to the storm and proclaimed the constitution, but after a period of great disorder the forces of reaction were once again able to restore despotic rule. In the Papal States an ugly situation was met by the granting of a constitution by the Pope on March 14, 1848. This, and the fall of Metternich in Vienna the previous day, decisively ended an epoch, but the papal constitution was a floundering document, for, if monarchical institutions and popular sovereignty were irreconcilable (as Metternich thought) how much more so were a sovereign pontiff and constitutional rule of any sort. An upper house or council of state was set up, but was nominated by the Pope. A lower house was elective, but on a restricted franchise, expressly reserved for professing Catholics. The deputies were severely restricted in their deliberations, being forbidden to discuss "politico-diplomatic questions",

IN NAPLES  
AND THE  
PAPAL STATES

while all laws were to be submitted to the Pope and the cardinals before they could go into force, and foreign affairs were declared to be no concern of laymen. Small wonder was it that the people remained unsatisfied, and that the more radical movement that was to drive the supreme pontiff from the Holy City and establish a constitution of "The Roman Republic" on February 10, 1849, found more favour in the eyes of the Roman citizens, who considered the papal constitution no more than an insult to their traditions of liberty. Better a full-blooded tyrant than a timid liberator, has always been their inclination.

In Tuscany, also, a constitution had been granted on February 15, 1848, as the revolutionary movement swept through Italy, but the most significant result of all was the manifesto of Charles Albert in Piedmont on February 8, promising to grant a constitution, which he honoured four weeks later, for this *statuto* of March 4, 1848, was to be the only Italian constitution to weather the reaction of 1849, and having weathered that, it was able to weather much more.

One of the causes of the general failure of the liberal and national movement in Italy which broke its bounds in 1848 (and which owed nothing by way of inspiration to the French "February Revolution", for Louis Philippe was not deposed until February 24), was the chronic and intense division of opinion in the country concerning the nature of the future Italian nation-state. Despite the *rapprochement* between Neo-Guelphism and Young Italy since 1846, the republicans had by no means abandoned their ideals, though they were divided among themselves, Mazzini favouring a unitary and Manin a federal Italian republic.

The result of the universal failure to maintain the gains of the revolution in the states of Italy (except Piedmont) or to advance the cause of unification in any

IN TUSCANY  
AND  
PIEDMONT

CAUSES OF  
FAILURE OF  
MOVEMENTS

material way, considerably simplified the Italian problem, and reduced the practicable methods by which unification could be achieved, to one only — the expansion to comprehend all Italy of the unitary secular monarchy of Piedmont-Sardinia and of the *statuto* of March 4, 1848. Both the Pope and the King of Naples proved traitors to the cause of expelling the Austrians from Italy, and the Pope's allocation disavowing the war against Austria lost him his prestige as a national and as a liberal figure, and (particularly when he and the secular princes restored their despotic rule with the aid of foreign arms) killed the cause of the Neo-Guelphs. Charles Albert, on the other hand, though he failed at Custozza and Novara and lost his own throne, had kept both his promises to Italy (to grant a constitution and to go into the field against the Austrians). Piedmont-Sardinia, of all the states of Italy, alone emerged from the years of revolution, despite the reverses of her king, with both a sincere constitution and an effective army. In 1851 Gioberti announced his conversion from papal federalism to the cause of unification around the Piedmontese nucleus, and the forward Crimean policy of Victor Emanuel and Cavour converted Manin in 1855, while Mazzini at last abandoned the republican ideal as impracticable, and the *Societa Nazionale* of patriots of all types was formed to create an "Italy without adjectives". The way to unification was still a hard and a thorny one, but at last the signposts were up, and 1859 succeeded 1856, 1861 succeeded 1859 and 1870 succeeded 1861, if not with monotony (Garibaldi prevented that), at least with a regularity absent from Italy's strivings to be free and united prior to 1850.

In 1870 the temporal power of the Pope was extinguished, Victor Emanuel of Piedmont-Sardinia found himself king of all Italy, in her traditional capital, the Austrians were out of the plains of Lombardy and Venetia,

FAILURE  
SIMPLIFIES  
ITALIAN  
PROBLEM

THE  
PIEDMONTESQUE  
NUCLEUS

and the insignificant Piedmontese *statuto* of 1848 was the constitution of a united nation-state that comprised the whole peninsula. Two mere geographical expressions, "Italy" and "Germany", became effective political expressions in the same year, and each process of unification was accompanied by the extension to cover the whole nation of a fundamental law previously applicable only to a part of it, though the rise of the Piedmontese *statuto* had been more spectacular than that of the constitution of the North German Confederation, which had comprised all northern Germany from its first appearance.

ITALIAN  
UNIFICATION  
COMPLETED

A constitution so adaptable and so elastic as to spread with the intensity of a forest fire from one small Mediterranean island and one north-western corner of the mainland of Italy, to cover the whole peninsula within a period of twenty-two years, might have been expected to possess originality and ingenuity to a high degree. Actually it possessed neither. Anticipating the general movement of 1848 in time rather than in ideas, the various Italian constitutions of that year tended to be copied from the French constitutional Charter of 1830 (just as that instrument was about to be discarded in France) when they were not revivals of the Spanish constitution of 1812, or pontifical concoctions of doubtful antecedents. The Piedmontese *statuto* was originally drafted in French and that fact probably makes the similarity of some of its provisions to the French Charter even more striking than they might otherwise have been, beside providing a basis for the modern fascist gibe that it was "imitated from Britain and imported in a bad French translation". Indeed, it is not even clearly derived from 1830, but tends to mix the new principles of the revised Charter of that year with the old principles of the original Charter of 1814, as when, straining to swallow a camel at one gulp, it faces both ways and

THE  
PIEDMONTESE  
"STATUTO"  
OF 1848

declares that the king holds his power "Per grazia di Dio et per volonta della Nazione". Though a *charte octroyée* in origin, for it was presented by the king to his people without first consulting them, it does not expressly reserve all or even any sovereign authority to the monarch. Though neither the sovereignty of the people nor a parliamentary executive is recognized by it, in practice they were both discovered to be implicit in the terms of the *statuto*. It was very much of a mystery trip for the Piedmontese king and people when they embarked upon this strange piece of statecraft in 1848, and to this day the *statuto* remains officially unrepealed in Italy, though few would pretend that it continues to be in force.

The *statuto* opens by declaring the Roman Catholic the only religion of the state, with toleration for "other cults now existing" (article 1). The form of the state is defined as "representative monarchical government" (article 2), the legislative power being exercised collectively by the king and the two houses (article 3), but the executive power belonging to the king alone (article 5), though the suspending and dispensing power is expressly denied to him (article 6). The initiative in legislation belongs equally to the king and to both houses, but the budget must be introduced in the Chamber of Deputies (article 10).

INFLUENCE OF FRENCH CHARTERS AND BELGIAN CONSTITUTION      The position accepted in the state by the king is thus more analogous to that of Louis Philippe than to that of Leopold I, but the declaration of rights and duties of citizens follows the Belgian constitution of 1831 very closely, though the article guaranteeing the freedom of the press omits the Belgian innovation concentrating responsibility upon the author, and permits an ecclesiastical censorship of "bibles, catechisms, liturgical and prayer books" (article 28).

Senators must be at least forty years of age and are appointed for life by the king from twenty-one categories, which include bishops, deputies after six years' service,

certain of the judges, high officers of the army and navy, senior members of the Royal Academy of Science, and "persons who, for at least three years, have paid direct property or business taxes to the amount of 3000 lire" (article 33). The Senate acts as a high court of justice in cases of high treason and for the impeachment of ministers (article 36). Deputies have to be at least thirty years of age (article 40) and each represents the nation as a whole (article 41), the contention of Burke and the old parliamentarians in England, as SENATORS AND DEPUTIES had been prescribed in the French Charter of 1830 and the Belgian constitution, against the "deputies of the departments" of the Charter of 1814. They are elected for five years (article 42), but the franchise is left to be defined by law, and article 39 thus covers everything from the mere two and a half per cent of the population enfranchised by the electoral law of 1848 to the universal suffrage of 1912. Unlike the Belgian constitution, the *statuto* does not allow one house to be in session when the other is not (article 48), and by a curious provision, about the only really original thing in the whole constitution, no business may be legally transacted in either house unless an absolute majority of the members is present (article 53). Article 55 prescribes that all bills shall first be submitted for preliminary examination to committees elected by each house, an interesting preference for American as against British legislative procedure, and a detail not previously dealt with specifically in a constitutional text.

Ministers are appointed by the king and must countersign all acts of the government. They are responsible and may be members of either house (articles 65-67). Here the British practice (adopted also in the French Charters and in Belgium) is followed instead of the American. Judges are appointed by the king and are irremovable after three years of service (article 69), a reversion to a feature of Bonapartist constitutionalism



abandoned in France, not only in the Charter of 1814, but also in Napoleon's own *Acte additionnel*. Article 73 follows the Belgian denial to the judiciary of power to interpret the laws (a power which had developed under the American constitution), by declaring "The interpretation of the laws, in the form obligatory upon all citizens, belongs to the legislative power". Finally, the king was empowered to make laws for the press, elections, communal militia and the reorganization of the council of state pending the assembly of a legislature (article 83). He was thus enabled constitutionally to decide the franchise for the election of the first Chamber of Deputies of the constitutional régime.

Though this was a common characteristic of legitimist constitutions (and the omission was not repaired in France in 1831), the entire absence of any special provision for amendment, a reflection of the British system or lack of system of government, gave to the *statuto* a flexibility which the *Charte* showed no signs of possessing. The *Charte* proved unalterable except under pressure of revolution and through change of dynasty, but the *statuto* could be and was amended by ordinary legislation. Thus, if in the power to amend resides true sovereign power in a state (as some contend), unlimited legal sovereignty belonged to the "king in parliament" in Piedmont-Sardinia, and later in Italy, as clearly as it came to be recognized so to do in Great Britain. The Belgian constitution of 1831, with specific and not over-complicated provision for amendment, was only amended on two occasions in over a century, but the Piedmontese *statuto* was amended on innumerable occasions, for any law regularly passed by the legislature and signed by the king might amend the constitution to a greater or lesser extent. The original *statuto* thus, strictly speaking, only

MINISTRY AND  
JUDICIARY

ROYAL  
PARTICIPA-  
TION IN  
LEGISLATION

AMENDMENT  
BY ORDINARY  
LEGISLATIVE  
PROCESS

remained the constitution of Piedmont for that short period after its promulgation that preceded the passing of the first law of the first legislature of the constitutional régime. The constitution of Piedmont-Sardinia (and after 1861, of Italy) came to consist at any given time of the *statuto*, together with all the laws passed since it first came into force. In addition to this unwieldy mass of fundamental law (for no law was less fundamental than any other or than the *statuto* itself) the *statuto* became overlaid with customs, which like the celebrated "conventions of the constitution" in Britain, were eventually considered binding, and which were rarely disregarded in practice while parliamentary government persisted in Italy. Thus the king came never to refuse his assent to laws passed regularly by both houses (which reduced the residence of sovereignty to the two houses alone); he also came to submit all treaties, and not merely those specified in article 5 of the constitution, to the legislature; a ministry became recognized as dependent for its continued existence upon the support of a majority in the lower house, but in cabinet crises, on the other hand, the king continued to retain wide discretionary powers (such as had disappeared in Britain before the death of William IV) regarding the appointment of a prime minister and the dissolution of the legislature. Although the *statuto* only permitted ministers to be members of the legislature, and did not demand it, it became the convention for all persons appointed as ministers to seek seats in the lower chamber if not already members of either house. Again, though the constitution says nothing on the point, it became the rule for legislation to be proposed in the chambers by the ministers, though private members did not entirely cease to bring forward bills. The Senate, while it successfully asserted its right to decide whether royal nominees appointed to it fell within the twenty-one categories prescribed by the *statuto*, was not able to make

the fate of a government dependent upon its confidence as well as on that of the lower house, and in disputes with the Chamber of Deputies it became recognized that the Senate would always ultimately yield (as when it yielded to the newly elected Chamber, after having defied the old one, in the dispute of 1878-80). In actual working the administration and its officials tended to play a far less responsible part in the government of the country than the existence of a sovereign legislature dominated by its popularly elected house would lead one to expect. Unification was succeeded by a strongly centralized *régime*

DELEGATION  
OF POWER TO  
OFFICIALS

copied largely from the French system. Parliament tended to delegate much power to officials, whose ordinances came to supersede much earlier legislation, thus making the exact constitutional position in the country even more difficult to elucidate at any given time; a considerable use was made of royal decrees instead of laws (though these were of course countersigned by ministers responsible to the Chamber) for important constitutional purposes such as the various annexations of states to the kingdom of Piedmont-Sardinia and Italy by which unification was completed, and for the electoral reforms of 1882. On

THE LAW OF  
GUARANTEES

the other hand, the notorious "Law of Guarantees" of May 13, 1871, dealing with "the Prerogatives of the Supreme Pontiff and of the Holy See and of the relations of the State with the Church", was passed as an ordinary piece of legislation, and subsequently (in 1878) declared to be a fundamental law of the kingdom by the council of state, but this gave it no greater validity than any other law, and in practice it had less, for the Vatican ignored it completely.

The franchise for elections to the lower house was established by royal decree in 1848 on a very narrow basis, and not until 1882 was it broadened by a further royal decree to treble the number of voters and to allow

for a gradually increasing number as literacy extended (for there was an educational test for voters). Soldiers, sailors and police officers remained disenfranchised, while priests and many state and local officials were still disbarred from becoming deputies, but one other electoral change of importance was made in 1882 by the abandonment of the single-member constituency in favour of larger districts electing from two to five members, a device to combat particularism in a country that had so recently consisted of so many different sovereignties. The *scrutin de liste* or preferential vote was also introduced, but both it and the large district were abandoned as soon afterwards as 1891 in favour of the previous system. In 1895 the electoral laws and decrees in force were codified in an attempt to clarify the system, which was continuing to give dissatisfaction, and the second ballot was introduced, while every successful candidate was required to poll at least half the total votes cast and at least one-sixth of the total number eligible to vote in the constituency. The taking up by the Vatican of a slightly less uncompromising attitude toward the Italian state, made it possible after 1903 for good Catholics to vote in elections, and increasing literacy made about thirty per cent of the adult male population eligible to vote in 1904, while universal manhood suffrage came in 1912. But still parliamentary government did not seem to be "taking" in Italy. Dissolutions were frequent, the average term of a Chamber of Deputies between 1848 and 1914 being under three years, whereas the maximum term was five, and standards of political morality both among elected representatives and civil servants (where insecurity of tenure and a vicious spoils system aggravated matters) still left something to be desired.

CHANGES  
IN THE  
REPRE-  
SENTATIVE  
SYSTEM

In 1919 Italy, like so many other countries, embarked on further electoral reform. The 508 single-member constituencies were replaced by 54 large districts return-

ing from five to twenty members each, by a complicated system of proportional representation involving the introduction of the *scrutin de liste*, the voter being given the choice of voting a straight ticket with or without expressing a definite order of preference among the candidates of his party, or (under certain restrictions) of splitting his vote. The illiterate voters (and about fifty per cent were still estimated to be illiterate in 1919) could deposit unmarked ballot papers bearing their party emblem, in the ballot box, and thus vote the straight ticket for candidates, arranged in the order of the party organization's own preference, with a minimum of effort. It was claimed by some that this produced in the election of 1919 a "just and inclusive representation", but by others that it played into the hands of the party caucus, was fruitful of corrupt electoral bargains, made it easy to mislead the illiterate voters, and too confusing for all but the most intelligent and painstaking of the literate voters to be able to express individual preferences among the candidates of their party or to split their votes between parties. In 1921 the details of the system were left unaltered, apart from reducing the number of constituencies to forty and providing for the representation of the new territories acquired under the peace treaties.

The fascist march on Rome in 1922 ended this long period of experimentation with an increasingly democratic parliamentary franchise, and the new régime first radically and then unrecognizably altered the electoral system. One constituency for the whole country, with the electors giving a blanket vote for the list of the party of their choice, was set up; then election results were "weighted" in favour of the party that received the largest number of votes; then came the one-party system and the corporative state, by which time the old-type democratic franchise had long since lost its meaning and an election had become virtually indistinguishable from a plebiscite.

ELECTORAL  
REFORM  
OF 1919-21

FASCIST  
ELECTORAL  
DEVICES

As the fascist *régime* has allowed the ancient hulk of the original *statuto* to remain unrepealed, yet has so completely destroyed the electoral system that had been developed within its shell, it is interesting to see to what features of electoral and parliamentary development the Fascist party most strenuously objected. Asserting that "Parliament deteriorated into parliamentarism" in the eighties, a leading fascist publicist has pointed to the career of Giolitti as showing the decay of the spirit of democratic liberalism, has complained of electoral corruption and violence since 1892, has called the deputies of that period "vulgar attorneys reduced to frequenting the antechambers of the ministers rather than the Chambers", has accused Giolitti of being "dictator of Italy" between 1903 and 1914 and of introducing universal suffrage to perpetuate his dictatorship, and has seen in a series of minority cabinets ruling in defiance of the chambers the breakdown of parliamentary government long before fascism swept it aside. Between this and a more charitable view of the parliamentary *régime* in Italy, as compared with alternatives, non-Italians may take their choice.

FASCIST  
CRITICISM  
OF PARLIA-  
MENTARY  
SYSTEM

## CHAPTER XV

### SWISS NATIONALISM AND THE FEDERAL CONSTITUTION OF 1848

A GRAPHIC representation of the progress of Swiss national consolidation from the last quarter of the eighteenth century to the last quarter of the nineteenth, would rather resemble a fever chart. Starting at the somewhat cold-

THE OLD  
SWISS CON-  
FEDERATION      blooded level of the old confederation, a loosely tied bundle of petty units, by no means equal in status (for there were cantons, associates, allies and subject territories), recognizing no common sovereignty, possessing no common executive, and pursuing common aims and interests of a most tenuous sort (now that the threat to their independence which had provoked the original league of 1291 was removed), the Swiss people were soon, like so many of their neighbours, to run the gauntlet of French revolutionary influence and Napoleonic intrigue. Up shot the political temperature as the Swiss, accustomed for centuries to fighting other people's battles and minding their own business, found their country subjected to the marches and countermarches not only of French and Coalition armies, but also of foreign constitutional ideas.

The feverish years between 1798 and 1803 produced first the directorial republic one and indivisible, then nostrum after nostrum until Napoleon Bonaparte administered the cooling draught of a federal form of government in the Act of Mediation. The Swiss had been unable to stomach complete unity, but they did retain the equalitarian principles of the revolution. The cantons regained their identity and a portion of their separate

UNITARY  
PRESSURE  
FROM  
WITHOUT

sovereignties, but the old variations in status did not re-emerge. The pressure of Napoleon forced them to work together, but it also caused them to resent federalism the more strongly because it was imposed on them from outside, and in 1813, when the allies occupied Switzerland, many of the cantons leaned in the direction of a restoration of the old confederation. A compromise, approved by the powers at Vienna (who now gave a perpetual guarantee to respect Swiss neutrality), produced the Confederate Pact of 1815, comparable in some ways to the German *Bundesakte* and equally inadequate as a national instrument. The separate cantons re-asserted their complete sovereignty (though a fresh subjection of the previous subject territories was prevented) and though a diet (in which all the cantons were equally represented and twelve had to agree to any measure before it could be effective) was retained, the central executive of the Act of Mediation was abandoned. These Articles of Confederation of the Swiss reduced common action once again to a subnormal state of lethargy. The cantonal constitutions and cantonal government went back into the old oligarchic ways, and something very similar to the "confederations" of the old Poland of the days of the *liberum veto* appeared in the shape of separate leagues and counter-leagues of groups of cantons, liberal against conservative, Catholic against Protestant, and "concordats" binding some but not all the cantons to a common policy on specific points (such as free residence, mixed marriages, a common coinage and joint manœuvres).

Despite a gradual advance of liberal ideas in certain of the cantons, the confederate organization (as in Germany) remained stagnant and inactive in everything but maintaining the *status quo*, and supporting the system of Metternich (as when the right of asylum in Switzerland for political refugees was suspended in 1822). The influence of the Greek revolt and of the 1830 revolutions in



neighbouring states produced radical constitutional revision in certain of the cantons. The property qualification for voters tended to disappear; freedom of the press, of speech and of trading was recognized; advanced democratic devices began to be adopted (as in St. Gall, where the people could veto any act of the legislature); the people ratified the new constitutions, some of which recognized popular sovereignty, and there was adequate machinery for future amendment. Nevertheless the league of seven radical cantons of 1832 failed to carry this reforming spirit into the national sphere, for it required twelve cantons to force any amendment of the pact of 1815, and the conservative cantons also formed their confederation. Thus things continued as they were, even without the threatened intervention of Prince Metternich. Certain minor causes of friction between the cantons (such as the matters of the division of Basel and Schwyz) were removed, but for the main part Switzerland remained a bickering league of nations in miniature, with no common coinage, no common postal system (it cost more to send a letter from Geneva to St. Gall than the same letter to Constantinople) and no common customs policy (though internal tariff barriers had not been revived).

REFORMS IN SEPARATE CANTONS

CONSERVATISM IN NATIONAL SPHERE

A Swiss nation-state, with adequate constitutional means of expressing and executing a common purpose, seemed as remote as ever, and the religious troubles of the later thirties and the early forties, first the question of the monasteries and then the problem of the Jesuits, by driving new wedges between the catholic and the protestant cantons, appeared to be postponing it to the Greek Kalends. The catholic *Sonderbund* of seven cantons resorted to armed resistance against the secularizing and unifying tendencies at work in Switzerland in 1845, and matters came to a head in 1847 when the remaining cantons represented at the diet, stung at last to activity by these efforts which

seemed likely, if unchecked, to dissolve even the weak confederate link, declared the *Sonderbund* dissolved, expelled the Jesuits and announced that the pact must be reformed. The short civil war of 1847 defeated the *Sonderbund* and put liberals in power in the seven cantons, and attempts at intervention on the part of the forces of reaction outside Switzerland (as in the joint note to the Swiss diet from Austria, Prussia and France of January 18, 1848) were cut short by troubles much nearer home in February and March 1848. The tables were turned when Neuchâtel, a member of the Swiss confederation, though a domain of the king of Prussia, rebelled against Frederick William IV and established a republic.

THE  
"SONDER-  
BUND" WAR,  
1847

Left to their own devices for the first time in over half a century, while, on this occasion, all Europe boiled around them, the Swiss, with liberals at the head of affairs in most of the cantons, remained cool, and without further disorder or civil strife, set about turning their league of nations into a federal state once more, this time a federal state of their own choice, and not one "fabriqué dans le salon de Madame Bonaparte". Reform was approved as essential by the votes of  $15\frac{1}{2}$  of the cantons in the diet, with only  $6\frac{1}{2}$  against (the former representing a population of two millions and the latter 300,000), and in the new constitution of September 1848 Switzerland may be said to have found voluntary expression as a nation-state for the first time, for though the country was still called a confederation and the cantons continued to be known as "sovereign cantons", they very definitely gave up enough of their separate sovereignty when they accepted the new constitution, to permit a true federal state to exist, with an effective bicameral federal legislature having one house elected on a national and popular basis and (within the somewhat narrow limits prescribed for it) an effective central executive.

SWISS  
FEDERAL  
CONSTITUTION  
OF 1848

The traditional brusque independence of mind of the Swiss did not prevent them from profiting from constitutional developments abroad, even though they did not subject foreign examples to the long drawn out and exhaustive examination indulged in by the contemporary

German national assembly at Frankfurt.

SOURCES OF  
INSPIRATION

The constitution of the United States of

America represented the most obvious analogy to the form of government that might suit the federated Swiss cantons, Belgium (despite her monarchical institutions) provided much inspiration in defining and protecting the rights of the subject, while Switzerland could not and did not remain indifferent to developments in France. Much of the 1848 constitution was derivative, but all was filtered through channels of Swiss experience and Swiss needs, and even the despised Act of Mediation (the one previous form of government in Switzerland possessing elements of true federal organization, and a form under which many people in the cantons of 1848 had lived and, willingly or not, helped to administer) was by no means ignored. The finished article represents much careful elaboration of devices which had already found cruder expression in other constitutions, Swiss and foreign.

The Swiss constitution of 1848 (as is consequently the present day constitution derived from and in many

A METICULOUS  
DOCUMENT

places identical with it) is a most meticulous document. The definition of the powers and the delimitation of the competences of the central and cantonal governments are set down in great detail, and the granting of so many express powers (residual powers remained with the cantons) to the federal government left little room for any doctrine of implied powers. On the other hand, the division of power between the different branches of the federal government is by no means so precisely drawn as in the United States. This may be said to be a reflection

of the working of the American constitution over a period of sixty years, during which the somewhat sketchily drawn sphere of the federal government had been subtly enlarged by implication and interpretation, to the accompaniment of violent controversies (of which the United States Bank struggle and "internal improvements" were recent examples and the states' rights and nullification movement still the most crucial) and during which, also, the sacrifices of the men of 1787 at the altar of the sacred principle of the separation of powers between executive, legislature and judiciary had been followed by more than a little backsliding on the part of their successors, without apparent prejudice to life, liberty or the pursuit of happiness.

PROFIT FROM  
AMERICAN  
EXPERIENCE

Ambiguity concerning the extent to which Switzerland became, under the constitution of 1848, a true federal state, belongs rather to the "padding" than to the essential structure of the document. After the preamble has respected the feelings of the particularists in the cantons by retaining the term "confederation" and speaking of them as "sovereign" the cantons are carefully enumerated (as were the separate states by the American Articles of Confederation), are declared to have all residual powers (article 3) not expressly granted in the constitution either to the federal or to the cantonal authorities, and have their territory, their sovereignty (to the degree that the constitution preserved it), their separate constitutions and the liberties and rights of their citizens guaranteed (article 5). Then follow the articles which give to the federal government its teeth, and draw those of the cantons. All separate alliances between the cantons are forbidden (article 7) if of a political nature (for the era of league and counter-league was fresh in everybody's mind) and the federal government is given drastic powers of intervention in one or more of

TEETH OF  
CANTONS  
DRAWN

the cantons in cases of internal disturbance or threats from outside, at or ("if the safety of Switzerland is endangered") without the request of the cantonal authorities concerned (article 16). This goes much further than article IV, section 4, of the United States constitution which restricts federal intervention to cases in which either the state legislature or the state executive (when the legislature cannot be convened) shall apply for it. In one other direction too, namely the regulation of commerce, the federal sphere was made distinctly wider than that defined by the United States constitution, and it was made possible for the federal legislature to deal with commercial matters in general (certain specific subjects alone being excepted) throughout the country, and not merely with intercantonal commerce. Thus in 1849 the postal system was taken over by the federal authority, in 1850 the coinage, in 1851 telegraphs, weights and measures, and in 1854 roads and canals, though it was decided in 1852 to leave railroad development to private enterprise (a policy reversed fifty years later, at great expense to the state). The pill of federalism was gilded to a certain extent by provision for the enforcement by the cantons of much federal legislation (as in the case of the weights and measures system) and a great deal of lip-service to cantonal rights was paid, but nothing could disguise the fact that the Swiss "confederation" of

A STRONG  
FEDERAL  
STATE

September 1848 was a strong federal state, giving in some respects wider authority to the central government than existed in the United States of America. Not only potential but also actual powers of interference in the separate cantons were greater, and no supreme court was set up, as in America, to check the federal authority from overstepping its bounds.

This wide authority was vested in a bicameral federal legislature which itself elected the federal executive (and eventually the federal judiciary, which was only created

in 1874). The legislature was modelled closely upon the United States Congress, for the upper house (*Ständerat* or *Conseil d'état*) consisted of two representatives from each canton, chosen by the cantonal legislatures, and the lower house (*Nationalrat* or *Conseil national*) was elected

FEDERAL  
LEGISLATURE  
ELECTS  
EXECUTIVE

directly by the people, but on the basis of a universal manhood suffrage (the voting age being fixed at 20), one representative being elected for each 20,000 of the population. In 1848 the franchise for the American House of Representatives, depending upon the various franchise laws of the separate states (in accordance with article I, section 2 of the constitution), was by no means uniformly based on the principle of universal manhood suffrage (even reckoning free white population only), and thus the democratic franchise which was to come gradually and unsystematically into being for the House of Representatives, was in existence from the beginning for the Swiss *Nationalrat*. Here (along with France, whose universal manhood suffrage also dates from 1848) Switzerland led not only the United States but the world. The two houses of the Swiss federal legislature were placed on

UNIVERSAL  
MANHOOD  
SUFFRAGE  
ESTABLISHED

an equal footing, neither (contrary to a constitutional practice tending elsewhere to be universal) having any priority in dealing with financial measures. They were elected at the same time for a period of three years, and could not be dissolved earlier. They had to meet at least once annually at Berne (for Switzerland now once more acquired a capital).

The executive, and the relations of legislature to executive, differed very sharply from the American system, and indeed, from all others except the French of 1793 and 1795 and that of the Helvetic republic of 1798, in which its germ can be discerned. The reformers of 1832 had harked back to the directorial model when they had proposed a central executive of five for Switzer-

land, and the framers of the constitution of 1848 adhered to this tradition when they set up an executive council (Bundesrat or Conseil fédéral) of seven, elected for three years by the two houses of the legislature in joint session, out of all enfranchised citizens, but not more than one from any single canton. The houses also elected, from among the seven, a president and vice-president to hold office for one year only, and who could not be immediately re-elected. Members of the executive council were not permitted to be members of either house, but could appear and propose motions (though not vote) in both. All decisions of the executive council were to be regarded as collective and its powers and duties were most explicitly listed in the constitution itself (article 102).

EXECUTIVE  
IN THE  
DIRECTORIAL  
TRADITION

This federal executive, surely one of the strangest fish ever to come out of the stream of constitutional ideas, differing spectacularly in principle both from the parliamentary executive of Britain and the completely separated executive of the United States (though employing features of both), and hatched under the unpropitious stars of the Directories of 1795 and 1798, might confidently have been expected to have worked as badly and broken down as quickly as the method of electing the American President and Vice-President devised in 1787, or not to have worked at all. *E pur se muove!* It actually worked so satisfactorily for the needs of the Swiss people, who had no George Washington and who wanted no Andrew Jackson, who had found Palmerston a useful well-wisher without relishing the idea of his counterpart at Berne, who admired Leopold I, but considered his functions quite supernumerary, that they have retained this colourless, transient, diffused and virtually anonymous executive council, with its even more transient and only slightly less anonymous presiding officer, for close upon a century, almost completely unchanged in structure. Quite apart from the extensive

FEDERAL  
EXECUTIVE  
COUNCIL

revision of 1874, the Swiss federal constitution has been amended detail by detail in scores of places, but only one very minor alteration has been made to article II, section 2. The federal executive therein defined is in no sense a cabinet, for its members are not selected by the head of the government, but are separately elected for a fixed period, and they need not necessarily have a common policy or belong to the same political party, being more in the nature of a standing committee of the legislature as a whole, though they are not responsible to that body or in any way dependent either upon the confidence of a majority of that body or upon that of a prime minister. When the policy of the executive council is reversed by legislative action or by popular demand, the council is neither desired nor expected to resign. But its irresponsibility and irremovability during its term of office tends to lose significance owing to the modest nature of its normal powers. It tends to resemble the French Directory during the final period before Brumaire rather than the Committee of Public Safety, and only when temporarily accorded plenary powers by the legislature in a time of international crisis or national emergency (as was done in 1870 and again in 1914) can it be called a powerful executive. Distrustful of central executive power of any sort, and determined that if it must exist it should never become dominated by any popular or masterful individual or group, the Swiss people in 1848 put this executive power into revolving commission, where it has continued to revolve unobtrusively and, to all appearances efficiently, ever since. Happy is the institution as well as the country that has no history.

EXECUTIVE  
POWER  
PLACED IN  
REVOLVING  
COMMISSION

The organization of the federal legislature as well as that of the federal executive, met with general approval on the basis of their working after 1848. The Swiss people wanted their federal machinery to act quietly, and both houses proved to be decorous bodies, accepting their



equality of status urbanely. The Council of the States, though analogous in most ways to the American Senate, never acquired the pre-dominating place in the legislature and the great position of authority in the government of the country of that body.

The extent of the powers granted to the federal authorities, on the other hand, did not long continue to give satisfaction, even in the cantons. The 1848 constitution had after all been a compromise of national tendencies with a stubborn and deep-rooted particularism, and great as the advance was over the disarticulated confederation of 1815, the new system was "a bargain between twenty-two sovereign cantons" still jealous to guard every vestige of individual sovereignty that it did not seem absolutely essential to give up. Generous in the commercial sphere, where material interests everywhere (as in the United States in 1787) recognized the superiority of nation-wide organization and regulation, they were more niggardly in other directions, such as legal codification and control over the armed forces,

FURTHER  
EXTENSION  
OF FEDERAL  
SPHERE  
DEMANDED

where local prestige could be maintained without immediate material discomfort. Agitation for further extension of the federal sphere therefore soon arose, and by the eighteen sixties it had become insistent. The partial unification of two neighbouring countries, Germany and Italy, and the greater federal consolidation achieved in the United States, following defeat of states' rights and nullification in the civil war, acted as additional stimuli. A general revision of the constitution in a more unitary direction was proposed in 1865, but only two trifling amendments (to articles 41 and 48) were carried. Nevertheless, the tide was flowing. The process of amendment was not difficult enough to be a disheartening factor, for it only involved securing for any specific proposal or group of proposals a simple majority of all voters in a

national poll on the basis of the manhood suffrage, with the proviso that a majority should also have been secured in this same popular vote in more than half of the separate cantons. In 1870 and 1871 Germany and Italy completed their unification; French institutions were again in the melting-pot; Britain had "shot Niagara" and was making a crabwise approach to the perennial Irish problem; the Hapsburgs were continuing their fitful flirtation with constitutionalism; even Russia was stirring perceptibly.

In 1872, therefore, came a drastic redrafting of the constitution, which gained the support of the National Council, but which was rejected by a majority of the people and by thirteen of the twenty-two cantons. Another compromise was necessary, for the unitary zeal of the few had again outrun the conservatism of the many. In 1873 concessions were made in the clauses of the draft dealing with unification of the law and army control, while the provision for the accordance of a legislative initiative to the people with regard to federal measures (the initiative already existed in certain of the cantons) was dropped altogether. This made it possible for the constitution in its revised form to gain acceptance by fourteen and a half of the cantons and a substantial popular majority.

REVISED  
CONSTITUTION  
ACCEPTED,  
1874

So many were the detailed changes (though the essential structure of government of 1848 remained) that the new form is known as the constitution of 1874, and it has survived as such, without further general revision, to the present day. It differs from the older form of the federation notably in the provision for a federal tribunal (*Bundesgericht* or *Tribunal fédéral*) to sit at Lausanne and to deal with disputes of all kinds referring to federal matters. This filled a gap in the system of 1848, but it can hardly be said to have created a supreme court in

FEDERAL  
TRIBUNAL  
SET UP

any way analogous to that of the United States. The tribunal was made to consist of nineteen members, elected for six years by the two houses of the federal legislature sitting together, exactly as when electing the federal executive. In the same way a president and a vice-president of the tribunal were to be elected to hold office for two years. The tribunal could appeal for guidance to the Council of the States, or, in special cases, to the two houses sitting together. In the last resort, therefore, the interpretation of the law and of the constitution was not to rest with this tribunal. It was given, sitting with a jury, penal jurisdiction over cases of high treason and a few other categories. In 1914 a separate federal administrative court was created.

Swiss citizenship was placed in 1874 upon a broader basis. In 1848 a common national and cantonal citizenship had come into existence, but communal citizenship remained separate; now membership of any commune was made to carry with it full cantonal and federal rights in any part of Switzerland — another sign of the crumbling of the old particularism. In accordance with the

FURTHER  
UNITARY  
TENDENCIES

trends of the times, elementary education was now also placed under the supervision of the federal authority, though the system was still to be administered by the cantons, whereas the 1848 constitution had only recognized higher education as a federal sphere. In 1902 a system of subsidization of elementary education in the cantons by the federation was permitted, and the supervision already allowed became much more effective. The power of the state in the religious sphere, already great as a result of the victory of the secularizing forces in 1847, was strengthened, and civil marriage now became compulsory.

The most interesting innovation of 1874 was undoubtedly the facultative referendum. Almost alone in the modern world the Swiss had preserved the traditions and practices of direct participation of the people as a

whole in government, and they were now the pioneers in the adaptation of the machinery of direct democracy to the needs of a population many times larger than that of the city states of ancient Greece or the forest communities of Uri, Schwyz and Unterwalden. The amendment clauses of the constitution of 1848 had, of course, accorded a limited right of popular referendum, the so-called "compulsory referendum" required on proposals for constitutional reform put forward by the federal legislature, but this had not applied to ordinary laws on which the people as a whole might have been desirous of passing a specific opinion. The constitution of 1874 made possible this "facultative referendum" (already a popular device in the cantons) by requiring that a referendum should be held with respect to any federal law or decree at the request of at least 30,000 citizens or eight of the cantons. The next stage in direct democracy, the legislative initiative (also in existence in certain of the cantons before 1874) was, as has been indicated, too advanced to secure federal recognition in 1874, but (with more and more cantons adopting it for local use in the meantime) it eventually secured acceptance as an amendment to the constitution in 1891, though it was limited to proposed amendments to the constitution and not extended to the proposal of ordinary laws. Any amendment supported by 50,000 citizens had to be discussed by the federal legislature, after which it went to popular referendum accompanied by the legislature's recommendation for or against it, or its counter-proposal. Already in 1874, 50,000 citizens had been permitted to demand a referendum on the advisability of a complete revision of the constitution, but the initiative for partial revision introduced in 1891 was a less cumbersome and more practical device.

Since 1874 the tendency has been toward still greater centralization as well as more and more democratization.

THE  
FACULTATIVE  
REFERENDUM

THE  
LEGISLATIVE  
INITIATIVE

The constitution still remains clearly federal, and on certain matters (notably the extent of their control over the training and maintenance of the army) the cantons have withstood all onslaughts upon their rights, while they still, of course, retain residual powers, but on the other hand, the federal sphere has notably widened, and is already, in most directions, well beyond the advanced claims from which it had to recede in 1872 to the more modest arrangement of 1874. For instance, in 1874 the federal authority was given the right to codify certain specific sections of the civil law and to reduce the varying cantonal laws to uniformity, and following the nation's approval of such consequences of this as the new law of bankruptcy (1889), the federal authority was allowed by constitutional amendment to codify the remainder of the civil law and the criminal law. Both branches have now a national code, but the criminal code had to wait until

NATIONAL  
LEGAL CODES  
FINALLY  
ADOPTED

1938 for acceptance by a majority of people and cantons. In the commercial and industrial sphere too, frequent amendment has increased the federal competence (as in control over forests, water-power, road transport and river navigation), as well as in that of social and health matters (such as sickness, insurance and notifiable diseases).

This extensive development of Switzerland's consciousness as a nation-state (despite her four official languages and mixture of religions) and the consequent extension under the constitutions of 1848 and 1874 of the federal sphere of influence, should not be allowed to overshadow the continued healthy development of her basic local institutions of ancient origin, modernized since the end of the eighteenth century just as completely as the general government. It is upon these primarily, that the health of the body politic in a country of such geographical, economic, racial, linguistic and religious heterogeneity in a relatively small area, depends. The

LOCAL  
INSTITUTIONS  
CONTINUE TO  
FLOURISH

basic administrative and local self-governing unit, the political commune, dates in its present form only from the Helvetic republic of 1798 and is therefore a gift of the French Revolution to Switzerland. There are over 3000 of these *Gemeinden* or *Municipalités*, each with its own elected assembly, executive council and president. Next in the scale of local government stands the administrative district, a subdivision of the canton. There are 187 of these, each with its prefect, representing the cantonal authority, and its elected governing bodies. The cantons, numbering twenty-two, still play an individual part in the life and government of Switzerland that shows no signs of complete disappearance (though the neighbouring example of Germany should not exclude the remote possibility of dissolution under some extraordinary and as yet undiscerned pressure). In eighteen of these cantons (or half-cantons) exist legislatures elected on a completely democratic basis, and almost uniformly they have adopted the referendum, the initiative and proportional representation (as did also the federal legislature in 1919), but four (Uri, Unterwalden, Appenzell and Glarus) have retained the ancient *Landesgemeinden*, periodic meetings of all citizens for the purpose of direct popular legislation and (to a certain extent) administration. The small size of these cantons allow (though with increasing difficulty owing to increased population) the survival of these interesting and almost unique institutions.

COMMUNE,  
DISTRICT  
AND CANTON

DIRECT  
DEMOCRACY  
OF THE  
" LANDES-  
GEMEINDEN "

Indeed, interesting and almost unique are terms that could be applied to the modern Swiss constitutional system as a whole. The influence of Switzerland upon other modern constitutions has been considerable (the British dominions and the German Weimar republic are cases to point), but this has been less in the sphere of general structure than in the *minutiae* of the system. Some constitutional devices first (or primarily) developed

in Switzerland have found their way around the world, but many Swiss conditions remain peculiar to Switzerland, allowing a peculiar type of nationalism and a special type of democracy to flourish there, but making transplantation both difficult and dangerous.

## CHAPTER XVI

### GERMAN NATIONALISM AND THE FRANKFURT CONSTITUTION OF 1849

BOTH in Italy and in Switzerland the year of revolutions, 1848, saw the creation of constitutions destined to form the permanent bases of nation-states which had not, except momentarily, existed or been given effective governmental organization before. In Italy, where the aim had been narrowed to the consolidation of a geographical expression into a unitary state, the way was harder, but there was no retrogressive break in the process between the publication of the Piedmontese *statuto* in 1848 and the occupation of Rome in 1870. In Switzerland a greater heterogeneity of race, language and tradition, made a federation the only practicable solution to the problem of building the nation-state, and a successful federation was achieved at one stroke in 1848. In Germany, where heterogeneity in race and language was less than in Switzerland (and indeed not much greater than in Italy if the non-German dominions of the Hapsburgs and the Hohenzollerns be excluded), in tradition it was far greater, and in a much larger country than either Switzerland or Italy. It was on the rock of this heterogeneity of tradition that the effort to create a German nation-state foundered in 1848-49. The bold stroke which sought to give to all Germans a federal form of government to which the separate states should surrender a large proportion of their sovereignties, proved less effective in the end than the modest and localized effort that presented Piedmont-Sardinia with a unitary constitution which was to prove unexpectedly elastic. While nothing of the Frankfurt

ITALY,  
SWITZERLAND  
AND GERMANY  
IN 1848



constitution of 1849 survived the reaction, the *statuto* managed to live on. Theoretically the Frankfurt constitution was far superior as an instrument of government to the Piedmontese *statuto*, and as the form of organization of a federal state it had advantages both over the American constitution of 1787 and the Swiss of 1848 (on both of which it had the chance to improve), but in practice it proved to lack just that toughness, just that ability to survive adverse circumstances that these other instruments, with all their imperfections, showed themselves as possessing. It remains the most impressive to political scientists, the most disappointing to political idealists and the most ludicrous to political opportunists of all still-born constitutions. Failing to become a form of government, it remained a programme, and as such exerted its influence upon Germans for eight and a half decades. Though it belongs to a tradition later spurned in the land of its birth, its impact upon German history and constitutional development is a fact which cannot be eradicated.

Why, possessing so many high qualities, did the Frankfurt constitution fail, while the Swiss succeeded with very similar material? An analysis of the conditions in which it was created and of the background of those conditions, is more fruitful in providing the answer than an analysis of the constitution itself, though both are necessary.

"The diet is the bed upon which Germany has slumbered for thirty years", declared Prince Hohenlohe in 1847, a statement more picturesque than true. If it was a sleep it was a troubled one, and in its later stages it resolved itself into a none too peaceable awakening. The period between 1815 and 1848 witnessed, it is true, no constitutional activity in the national sphere, but in most other directions, social, economic, literary and political, it was a time of great development. In the

FAILURE OF  
FRANKFURT  
CONSTITUTION

states as separate political entities there was generally an increase in economic prosperity (at least until the late thirties, and in some until the famines of the forties), and the period saw the coming of the railways and the new customs unions, the two factors which contributed most, in the long run, to Germany's industrial and commercial transformation in the nineteenth century. Governmental paternalism, producing social reform and experiment, was by no means absent, though not general in the German states. In Prussia in particular it was "the golden age of efficient bureaucratic rule".

GREAT  
DEVELOP-  
MENTS IN  
GERMANY,  
1815-1848

In the less fruitful sphere of national endeavour, the period divides into three steps up from Vienna to the revolutions of 1848, three progressive stages of more hopeful and intelligent unrest and of agitation for the constitutional reform of Germany as a whole.

Before 1830 opposition to the system of Metternich and the treatment of the German problem at Vienna was spasmodic and ineffective, while the efficiency of the forces of reaction in repressing it, drove it from any tendencies it might have possessed toward constructive thought, into the realms of the wildest extravagance and violence. It is a period which is typified by the murder of Kotzebue by the student Carl Sand at Mannheim in 1819. The student movement of the *Burschenschaften* had its

NATIONAL  
AGITATION  
INEFFECTIVE  
BEFORE 1830

thinkers, but it is rather as a training ground for liberal and national leaders of later decades that it is important. Its early activity in speechifying and bonfire lighting only gave Metternich greater leverage on the German rulers who agreed to the Carlsbad decrees. The twenties saw fewer expressions of unrest, not because the irritation was removed but because the repression was effective, and Germany was busy building up her tariff unions (their starting point being the Prussian tariff act of 1818, and their existence being made unassailable through the

adoption of the "Bernstorff Clause" of the Vienna final act of 1820), presenting her quota of liberators to Greece, and driving her young writers abroad for inspiration.

The inspiration came from Paris. The July revolution of 1830 and the reform of the *Charte* had many repercussions in Germany. Some German rulers thought it at last advisable, after waiting fifteen years, to give to their people the minimal constitutions that the *Bundesakte* had implied they should; the literature of protest against the condition of Germany grew more extensive; the liberals in the states lifted up their heads and opened their mouths once more, and a short period of violent

INSPIRATION  
OF 1830

expressions of discontent occurred, which is reminiscent of the three or four years immediately following Vienna. Some of the German states attempted to quell this new discontent by means of granting or revising constitutions and fostering material interests, but the big quarrel of the radicals was less with their local governments (with whom they squabbled for practice, as it were, and because it was easier) than with the system of the *Bund* that stood in the path of a strong and united Germany, like Wotan with his spear. Carl Welcker, immediately after the news from Paris in 1830, advocated in the Baden second chamber the establishment of a German parliament side by side with the diet of the *Bund*. Young Germany, the literary movement which either made its centre in Paris, or turned its eyes in that direction for inspiration, formed its *Geheimbund* and made its onslaught upon the *Bundestag* in prose and verse. The *Bundesakte* had created a school of poetry dedicated to its detraction.

The German liberals, who made up for their lack of political experience by their zeal and enthusiasm in

NEW ACTIVITY  
OF GERMAN  
LIBERALS

opposition, now attempted to form themselves more definitely into an organized body, and the decade of the thirties saw the publication of their own particular political bible, the

*Staatslexikon* of Rotteck and Welcker, while the younger and less cautious radicals, fired by the events of 1830, resorted once more to violence such as the Frankfurt *Attentat* (an attempt to occupy the *Bundespalast*) of 1833.

By 1840 nothing tangible had been achieved by all these strivings, but the accession of Frederick William IV to the Prussian throne in that year was regarded as the opening of a new era in which this alleged enlightened prince would stimulate and lead reform in Germany. But in Frederick William IV was not the stuff of which either heroes or reformers are made, and things went on as before. The disappointment felt when the true character of this secular Pío Nono was realized, did much to prepare the way for 1848, and liberal speculation and agitation was redoubled. It was now that the leaders of the liberal oppositions in the various German states began to hold the annual joint conventions, and started the correspondence with leaders of radical thought abroad, which led by clearly defined stages to the national assembly of 1848.

DISAPPOINT-  
MENT IN  
FREDERICK  
WILLIAM IV  
OF PRUSSIA

Literature became even more intensely political, and the marked nationalism of the political lyrists now added its weight in the onslaught against the *Bund* to the cosmopolitan *Weltschmerz* of Young Germany. "Deutschland ist Hamlet", cried Freiligrath, and in the years immediately preceding 1848, she was. The impress of Metternich and the *Bund*, effective repression turning to less effective repression, the repercussion of movements abroad, and economic and social changes at home, had all conspired to make her turn an introspective eye upon her condition. It was a period of deep pondering, of toying with many theories, of the assimilation of many influences. Its consequences are to be read in the pages of the proceedings of the national constituent assembly at Frankfurt in 1848 and 1849.

A PERIOD OF  
POLITICAL  
INTRO-  
SPECTION

That something was rotten in the state of Germany many years before 1848 was perceived by radicals and conservatives alike. That this something was the structure of the *Bund* of 1815 was also realized. The only difference lay in the degree to which the *Bund* was thought to be defective. Apart from the few who, like Prince Metternich, from policy preferred it to remain rotten, those who perceived its defects wished either to reform it or to replace it, according to whether they thought that the rottenness reached to the core or not.

CONSERVATIVE  
PLANS FOR  
REFORM OF  
THE "BUND"

Throughout the forties plans for the reform of the *Bund* were in the air and they interested peoples and governments alike. Individual plans included those of Prince Leiningen and his brother-in-law, Albert of Saxe-Coburg-Gotha and Consort of Queen Victoria, which they presented to Frederick William IV and other German rulers in 1847, with the result that Frederick William, once again urged to lead the movement for the reform of the *Bund*, was moved at last to entrust his minister Radowitz with the task of preparing proposals to lay before the Austrian government on behalf of Prussia. Radowitz' famous *Denkschrift* was ready on November 20, 1847. In it he attacks the unreformed *Bund* with vigour, saying "To the question, 'What has the *Bund* done since the Peace (of Vienna) for the progress and prestige of Germany?' no answer can be given", and advocates increasing its effectiveness in a number of ways without altering its essential character as a league of sovereign states. But Metternich was not to be put to the embarrassment of dealing with these proposals, for almost immediately after Radowitz' delayed opening of negotiations in Vienna at the beginning of March 1848, the floodtide of revolution had swept Metternich aside and was carrying Frederick William along on its surface like a cork.

While conservative reformers and government spokesmen contented themselves with preparing patches for

the threadbare *Bund*, liberal and radical agitation came to concentrate more and more upon the creation of a German parliament of representatives elected by the people either directly or (through the state assemblies) indirectly. This was no new idea. Görres had mooted it and Stein had favoured it in the old, old far-off days of the liberation, and it was the recurrent dream of the two generations that lived and cursed in the shadow of the *Bundesakte*. It was in the annual joint conventions of liberals that met from 1839 onward, that the idea, by constant reiteration, acquired concreteness and familiarity. Both to moderate liberals, to whom merely a more effectively federated Germany was the goal, and to the extreme radicals who wanted the overthrow of monarchical institutions and a republic one and indivisible, the proposed parliament seemed equally attractive as a means to achieving their ends.

LIBERAL  
DEMAND FOR  
A GERMAN  
NATIONAL  
PARLIAMENT

Yet the idea had to acquire that popularity and general acceptance which would render it effective, and this could only be achieved by discussion, not merely at semi-private meetings of a few individuals, but in the state assemblies and in the public press throughout the lands of the *Bund*. Even at the beginning of 1848 the possibility of summoning a German parliament or of a general movement in favour of a reform of the *Bund* was so remote to the "standing committee" which had been set up as the result of the summoning of a united provincial diet in Prussia in 1847, that it voted, on January 28, by a majority of 68 against 28, that "Any attempt aiming at the destruction or modification of the German *Bund* shall incur the death penalty".

But a fortnight later, and still a fortnight before the fall of Louis Philippe in France, a motion was introduced into the Baden second chamber by Bassermann which made the idea of a German parliament public property and the

THE  
BASSERMANN  
MOTION

topic of the hour. His proposal was simply that "This chamber should, in an address to His Royal Highness the Grand Duke, make the request that support shall be given in the most effective manner to the creation of definite machinery for achieving the ends of common legislation and united national activity, by means of representation of the German assemblies of estates in the *Bundestag*". Its effect was electrical throughout Germany, for herein was felt to be not only a way out of the constitutional lockjaw of the *régime* of the *Bundestag*, but a spark which, in an atmosphere already tense, might set a world on fire. "The Bassermann proposal for the representation of the nation in the *Bundestag*", says an article in the *Augsburger Allgemeine Zeitung*, written five days after it was moved, "has been published throughout the lands of Germany, and it is now to be found in the hands of all those who have any thought or feeling for the situation of our people. What a reception this proposal will have among our assemblies and governments! . . . The idea, indeed, is an old one, but the occasion is new." In the debate on the motion, the radical Hecker cried that it would "mark an epoch in German history" and a biographer of Bassermann has called it, not without justice, "truly the starting point of the German movement".

The lengthy speech in which Bassermann amplified his motion was printed in full and in extract up and down the lands of the *Bund*. There was no possibility of compromise between a mere diplomatic confederation of states and a political federal states, he said. The *Bund* must be remodelled into a true federal state, which was preferable to one-sided unity by means of a general *Zollverein*, and this was to be achieved by the German parliament proposed in the motion. "What would England be without her Parliament? With a German parliament no such thing as the Peace of Basel or the

Confederation of the Rhine would have been possible." An example for Germany lay ready to hand in the United States. He traced the process by which the federal constitution replaced the Articles of Confederation. "Are there not many points of comparison with our own conditions and needs to be found in the history of that country? There are almost as many states united in America as the states of a united Germany would number, and the purpose of federation is in both cases identical, namely, the upholding of the interests and the dignity of a great nation. Germany can remain monarchical as it is, and democratization is not necessary, but it is obvious that a federation which shall fulfil its destiny in the midst of great nations armed for war, is in even greater need of unity than America." This was to be the keynote speech of the German national revolution of 1848.

Exactly a fortnight later came the abdication of Louis Philippe (not known in Germany until February 28, for this was the last revolution to be conducted without benefit of electric telegraph) and NEWS FROM FRANCE within a week the revolution was upon Germany, though in Bavaria it had broken out earlier on a local issue. It was the immediate stimulus of this news from France, combined with the atmosphere of unrest throughout Europe, that brought the German constitutional problem to a crisis and caused the convening of the famous Heidelberg assembly of March 5; but in origin the Heidelberg assembly was native and independent, for it was but the culmination of the series of annual joint conventions held since 1839, and it was called together at a moment made propitious as much by the effect of the Bassermann motion upon opinion in Germany as by external events.

The manifesto of the fifty-one members of the Heidelberg assembly entrusted to a standing committee of seven of its members both the calling together of "a comprehensive assembly of men possessing the confidence



of all the German peoples " and the preparation of a plan of constitutional reform. The immediate outcome of the work of this committee of seven distinguished liberals was the publication of " the programme of the seven " and the meeting of a preliminary parliament at Frankfurt am Main at the end of March. The programme of the seven was given weight by the fact that within a few days of its publication appeared two other plans for constitutional reform, strikingly similar to it in their recommendations, the one the result of a mission entrusted to Max von Gagern (at Gagern's own request) by Adolf of Nassau, for sounding the governments of Hessen, Baden, Bavaria, Württemberg, Saxony and Prussia on the subjects of a German parliament and a federal government, and the other the report of the committee set up by the new liberal government in Baden to discuss ways and means of implementing Bassermann's motion. Both the programme of the seven and the Baden report were drafted by Carl Welcker, the leader of the national constitutional school.

The constitutional movement had therefore, through the coincidence of these three plans, been given a strong positive direction in favour of a federal state, that should be monarchical but otherwise follow the organization of the United States of America very closely, even before the *Vorparlament* met on March 31. This preliminary parliament, consisting of 574 delegates, was somewhat arbitrarily chosen by the committee of seven from members of the legislative assemblies or diets of the separate states, and where such assemblies did not exist or (as in Prussia) members of the diets were otherwise occupied, from among other " notables ", of liberal leanings. Though the most representative popular assembly ever to purport to speak in the name of Germany as a whole up to that

THE  
HEIDELBERG  
ASSEMBLY

THREE PLANS  
OF CON-  
STITUTIONAL  
REFORM

THE  
FRANKFURT  
" VORPARLA-  
MENT "

date, the representation was glaringly uneven. Fully two-thirds of its members hailed from the lands of the Rhine valley, while all Austria only sent two. After four stormy days of debate, during which the efforts of the extreme radicals to have the *Vorparlament* declare itself permanent and proceed to create a German republic were defeated by a substantial majority of moderates, this preliminary parliament dispersed, having first agreed that a regular national assembly, freely elected on a basis of universal manhood suffrage with one representative for every 50,000 of the population of Germany (including Schleswig-Holstein, all Austria within the *Bund* and all the territories of Prussia, in or out of the *Bund*) should meet at Frankfurt am Main early in May to frame a constitution for all Germany, and having resigned its mandate into the hands of a committee of fifty, it dispersed. After heated discussion of the programme of the committee of seven and of the other plans for constitutional reform, the *Vorparlament* decided not to attempt to tie the hands of the future national constituent assembly by any positive recommendations, though it did entrust the committee of fifty with the task of drawing up a body of fundamental rights of the German people for presentation to its successor. Preparations for electing the new parliament were immediately put in hand.

Meanwhile, the *Bundestag*, under the pressure of events, had not been idle. Caught unawares by the force of the revolutionary movement and the schemes of the constitutional reformers, and regarded with contempt on every side, it nevertheless made a belated attempt to identify itself with the movement for assembling a constituent national assembly. As early as February 29 a committee of the *Bundestag* had been set up amid the excitement created by the news from France, to consider measures of reform, and a proclamation calling for the support of the German people was issued on March 1. On March 3 a decree

ACTIVITIES  
OF THE  
"BUNDESTAG"

abolished the censor throughout Germany (a recognition of a *fait accompli*) and on March 10 (after the Heidelberg assembly had set up its committee of seven) came the *Bundestag*'s greatest effort to centre in itself the movement for reform, in its summoning of seventeen men who would have the confidence of the people in the states from which they were sent. They were to represent the seventeen states and groups of states having votes in the inner *curia* of the *Bund*, and were to decide in conclave with regular members of the diet upon measures of constitutional reform. The decree was withdrawn under pressure from the governments of Austria and Prussia, but was reissued after the fall of Metternich, and on March 30 these *Vertrauensmänner* met the diet, urged upon it the acceptance of the Heidelberg programme (in the drawing up of which several of them had assisted) and persuaded it to issue a momentous decree summoning a national parliament of representatives of the people to deal with Germany's constitutional problems in co-operation with the governments.

The lead given by Heidelberg was thus followed slavishly by the now thoroughly cowed diet, and it meekly proceeded first to procure the resignations of those of its members to whom the *Vorparlament* objected, and then to alter its electoral decree to conform exactly to the decisions of the *Vorparlament* in this direction. When the committee of fifty had been set up, the diet continued to ape its recommendations one by one. On one point only (almost unnoticed at the time but very important later) did the *Bundestag* not fall entirely into line with its revolutionary rival. It never recognized the full sovereignty of the people to the extent of conceding the right of a popularly elected national constituent assembly to decide for itself whether or not it should work in co-operation with the governments of Germany. Consequently, when in 1849 the national

"BUNDESTAG"  
SLAVISHLY  
FOLLOWS "VOR-  
PARLAMENT"

assembly failed to secure the complete support of the governments for its draft constitution, it was possible for people to regard this constitution as inoperative and, after other plans had also failed to please, to revert, in 1850, to the old ineffective system of the *Bund* of 1815.

Before the constituent national assembly met on May 18, 1848, the seventeen *Vertrauensmänner* had added yet another important plan of constitutional reform to the three published at the end of March, and in its general lines it followed the other three, but its solution of the problem of the executive headship of the new German federal state was that of its *rapporteur*, Dahlmann. Dahlmann, one of the seven protesting professors of Göttingen of the previous decade, was a doctrinaire supporter of constitutional monarchy, and being convinced that there was no logical or acceptable place for Austria in a true German *Bundesstaat*, had set his heart on a solution of Germany's problems (as had Leiningen and Prince Albert) under the leadership and headship of the Prussian crown. But he had reckoned without the strange contents of the head which happened to be wearing that crown during these crucial years.

DAHLMANN'S  
"PLAN OF THE  
SEVENTEEN"

Already before the plan of the seventeen was published, Frederick William had sent to Dahlmann (along with Prince Albert's plan) his own weird project for a quasi-revival of the Holy Roman Empire, in which the imperial crown was to reside permanently with the house of Hapsburg, and a new German *Bund* was to be set up under which he would accept for the royal house of Prussia merely the office of hereditary commander-in-chief. As might have been expected, Frederick William could not bring himself to approve the plan of the seventeen, which ran directly counter to such ideas. "You may regard me either as a hypocrite or as an old idiot, completely off my head, but I tell you roundly that I will *not* accept the supreme

ATTITUDE OF  
FREDERICK  
WILLIAM IV

crown if it is offered to me." This was his position in May 1848 and from it he never receded. If Dahlmann and his fellow constitution-makers had taken this refusal more seriously, they might not have wrecked the constitution, which they took nearly another year to elaborate at Frankfurt, by accepting the principle of Prussian headship with the exclusion of Austria that Frederick William again spurned in March 1849, with such disastrous consequences to the immediate prospects of achieving a federated German nation-state. Apart from this fatal principle (to which circumstances as well as prejudice drove the Frankfurt assembly after the withdrawal of Austrian co-operation at the end of 1848) the plan of the seventeen gave guidance of very great value to the national constituent assembly. As a model it remained the most important (as it was the last, and sought to improve upon the others) of all the preliminary constitutional plans in existence before the assembly began its work. It is the judgement of Heinrich von Sybel that "the sphere of action assigned to its central federal government by the constitution of the United States of America, that paragon among federal unions, was the ideal which the committee of seventeen in April 1848 had set before themselves, and which the Frankfurt committee, the constitutional committee of the National Assembly, now again projected for the new imperial government". The faults and the virtues of the constitution and the plan of the seventeen tend to be the same. "Dahlmann, in the constitutional plan of the seventeen, gave to Germany's dreams of the future a palpable and living form, an actual reality", writes Springer, his biographer. Much the same has often been said of the Frankfurt constitution of 1849.

SIGNIFICANCE  
OF THE PLAN  
OF THE  
SEVENTEEN

The famous "professors' parliament" (which actually contained many more lawyers) sat in Frankfurt for a year almost to a day, and took ten months to produce its

constitution for Germany. The constitutional committee and the assembly in its constitutional debates were magnificently thorough and conscientious, but the consequent delay in coming to a conclusion was fatal. They never envisaged their work as a race against time. The prestige of the assembly in Germany, high when it first met, was raised even higher when it created a provisional central government, but after September 1848, when its authority was challenged first by Prussia's separate conclusion of the armistice of Malmö with Denmark and then by popular riots against it in the streets of Frankfurt, it no longer possessed the prestige to bring its work to a successful conclusion in the teeth of increasing opposition from the governments of Germany. Prussia had delivered the first blow; Austria delivered the second by her Kremsier constitution and her withdrawal from the assembly, which drove it to a *kleindeutsch* solution; and Prussia delivered the *coup de grâce* when Frederick William IV refused the hereditary crown of this lesser Germany when it was offered him by the assembly. The other merits or demerits of the constitution, which had been made to depend upon the acceptance of this offer, then became, overnight, irrelevant.

DIFFICULTIES  
OF THE  
FRANKFURT  
NATIONAL  
ASSEMBLY

But because even Bismarck, for all his scorn of the speechifying and majorities which were in his opinion "the mistake of 1848", made unacknowledged use of this constitution when creating Germany's first effective federal organization (*Kleindeutsch* by choice, not of necessity) in 1867, because the Weimar republic made greater and more open use of it just seventy years after its completion, because even the post-Weimar *Gleichschaltung* of the states with the *Reich* could, if it would, claim the constitution of 1849 as its grandparent (on both sides if necessary), because of these later manifestations of the intrinsic worth of this Frankfurt constitution, its details

FEATURES AND  
VALUE OF  
FRANKFURT  
CONSTITUTION  
OF 1849

possess more than the ephemeral significance that would otherwise be theirs.

The constitution is divided into seven sections, and these are subdivided into articles and paragraphs. It contains in all 197 paragraphs. Section one (the State) leaves residual power expressly with the separate states (§ 5). Section two (the Federal Authority) gives to the federal government the important powers of treaty-making, diplomatic representation, declaration of war and conclusion of peace and control over the federal army and navy, and also declares that it exercises supervision over the mercantile marine, coasts, rivers, railways, highroads, posts and coinage; it can set up a single system of customs and trade regulations for Germany, and it has the right to raise taxes, codify law, and, finally, pass (like the federal authority in the United States) all laws necessary for the implementing of the provisions of the constitution. These very extensive powers meant that the federal sphere was appreciably wider either than in the United States or in the new Swiss federation.

Section three (the Federal Executive Head) provides for an "Emperor of the Germans" (*Kaiser der Deutschen*)

THE FEDERAL EXECUTIVE HEAD ruling through responsible ministers, summoning and dissolving the legislature, exercising the prerogative of pardon, as well as appointing and receiving ambassadors and declaring war and concluding peace on behalf of the federation. The succession is to be hereditary in the male line, but the name of no actual king or dynasty is mentioned in the text of the constitution.

Section four (the Federal Legislature) provides for a *Staatenhaus* to represent the separate German states (half

THE FEDERAL LEGISLATURE its members to be chosen by the governments and half by the elected assemblies of the states) and a *Volkshaus* to represent the people (directly elected on the basis of universal manhood

suffrage from the age of twenty-five). Both houses must pass all measures that are to become law, and a triple passage of any bill through the legislature makes it law despite an executive veto. The upper house has a term of six years (one third of its membership being renewed each two years) and the popular house a term of three years (the term of the first popular house to be elected under the constitution is to be, by way of exception, four years). The budget is to be proposed by the government and introduced first into the popular house. Ministers may attend in either house and be members of the popular house. Members receive salaries and travelling expenses and are protected in the exercise of their parliamentary functions.

Section five (the Federal Judiciary) provides a supreme court very similar to that of the United States, but the sphere of its jurisdiction is much more precisely defined.

THE FEDERAL  
JUDICIARY

Section six (The Fundamental Rights of the German People) was the first to be completed and represents in many ways the most substantial work of the assembly. It owes a great deal to the Belgian constitution but is more comprehensive, its fourteen articles dealing respectively with citizenship and emigration, equality before the law and the abolition of titles and privileges of nobility, liberty of the person, freedom of expression, freedom of belief, the liberty of learning, the right of petition, the right of assembly, the right of property, rights in the courts of law, local autonomy, the state constitutions, the protection of non-German speaking minorities, and the protection of Germans resident abroad.

FUNDAMENTAL  
RIGHTS OF  
THE GERMAN  
PEOPLE

Section seven (Constitutional Guarantees) prescribes the form of oath to be taken by emperor and officials, declares that no state law shall be valid if counter to federal law, provides for amendment of the constitution by two-thirds

CONSTITU-  
TIONAL  
GUARANTEES



majorities of both houses, each to be secured on two different occasions, with the executive head concurring, or on three different occasions without the concurrence of the executive, and allows for the suspension of certain of the fundamental rights in times of national emergency.

Separate from the text of the constitution, a special electoral law was passed by the constituent national assembly on April 12, 1849. It laid down the detailed procedure for elections to the lower house and provided for the operation of a second, or if necessary of a third ballot, in order to assure an absolute majority of votes for each elected member.

SEPARATE  
ELECTORAL  
LAW

But the refusal of Frederick William IV to pick a crown from the gutter prostrated the constituent assembly, and the secession of those members who still, despite his refusal, insisted upon an hereditary emperor or nothing, disrupted it. After that, with the forces of reaction gaining strength again everywhere in the separate states, the constitution found itself deserted by its friends and surrounded by enemies. The first genuine attempt of the German people to give to themselves an effective general government and to Germany definite expression as a nation-state (though on a smaller scale than if the German lands of the Hapsburgs could have been comprehended) had failed. The Frankfurt constitution of 1849 fell between two stools. It was both before and behind its time.

## PART VI

### SUPRANATIONAL CONSTITUTIONS— THE SYNTHETIC STATE

## *Supranational Constitutions — The Synthetic State*

*The almost universal failure of the 1848 movements in Europe took the initiative in giving constitutional form to the nation-state out of the hands of the people, who had held it momentarily during the crisis, and delivered it into the hands of rulers and ministers. Unification tended to be imposed from above. Victor Emanuel and Cavour, not Mazzini and Gioberti, William I and Bismarck, not Gagern and Dahlmann, were the leaders, and their methods were very different from those of the liberal-nationalists. Internal risings to secure reform gave place to international wars. Italy passed through four and Germany through three such wars during the fifties and sixties in the process of securing unification, and the constitutional side of their consolidation was pushed from the centre of the stage to a subordinate position in the wings. Even the U.S.A. resorted to a civil war in the sixties to decide whether the union of 1787 comprised one or a number of nation-states. It was a period in which nationalism tended to swamp constitutionalism (as when Bismarck, for reasons of state, defied the Prussian parliament) and force to supplant argument (as with Garibaldi's thousand). International diplomacy was used to settle domestic issues, and treaties (such as those of Paris, Plombières, Villafranca, Prague and Frankfurt) overshadowed constitutions on their own ground.*

*Despite its success in Switzerland, federalism went into eclipse between 1849 and 1865. It failed to be adopted in Germany ; Austria received a strictly unitary constitution in 1849 ; Italian federalism was discredited, and even deserted by Gioberti after 1849 ; fresh attempts to reform the Bund in a federal direction, sponsored by Prussia, all failed ; federalism appeared to have produced a civil war in America. The outcome of that war helped to revive its prestige, but it had been shaken. The prospects of parliamentarism and democratization also seemed less promising during this period of an authoritarian empire in France, " Finality " in Britain, the abolition of the Austrian constitutional experiment, and the Prussian constitutional conflict. The state was again being placed before the nation.*

## CHAPTER XVII

### THE CRISIS OF FEDERALISM AND THE OUTLAWRY OF STATE SOVEREIGNTY IN THE UNITED STATES OF AMERICA

THE most spectacular achievement of the makers of the American constitution in 1787 was to demonstrate that federalism was a practicable form of governmental link for states scattered over a very large area of territory. The practicability of the American federal system was tested to the utmost during the first half of the nineteenth century, when, by the successive stages of the Louisiana purchase, the Florida purchase, the adjustment of the boundary with Canada, the annexation of Texas, the conquest of California and New Mexico and the Gadsden purchase, the sovereignty of the United States was extended from the Mississippi to the Pacific and to the north and south until they occupied their present continental area, and when, following the principles laid down in the ordinance of 1787 (which proved to be an active partner with the constitution itself in the development of the new nation) the number of member-states was more than doubled. No wonder the constitutional reformers of Europe during that period studied and sought to emulate American federalism where, as in Germany and Switzerland, conditions were in any way analogous to those in the United States prior to 1787, and that where the analogy did not hold good, as in France and Britain, radicals sought stimulus from that other achievement, the deficiency of which in 1787 Thomas Jefferson had deplored, the development of which in 1828 Andrew Jackson had symbolized, and the existence of which in

FEDERALISM  
AND  
DEMOCRACY  
IN AMERICA

1835 Alexis de Tocqueville had demonstrated, namely "Democracy in America".

But neither the developed federalism nor the developing democracy of the United States proved capable of transplantation on a universal or even on a large scale. Happenings in Latin America did not much disturb Europeans during the first half of the nineteenth century before they had sunk their capital into that part of the world to any great extent, so they were indifferent to the fate of institutional borrowings from the United States there, but in Europe itself the successful adaptation of certain features of democracy in America by Belgium and of certain features both of American democracy and of

SLIGHT  
PROGRESS  
IN EUROPE

American federalism by Switzerland, did not make up for the failure of the Frankfurt constitution, closely following American federalism, to find acceptance in Germany, for the abandonment by Italy of strivings toward a federal solution to her governmental problems after 1848, for the refusal of the Hapsburgs to consider the possibilities of federalism for their heterogeneous dominions, and for the set-back to democratic development in France (with the disappearance of the brief second republic), in Britain (with the decay of the Chartist movement and the persistence of "Finality") and elsewhere at the end of the forties.

Events in the United States themselves from the middle of the century onward tended to make American federalism and democracy less attractive to the rest of the world, for the breach between the northern and southern states, ever broadening through the fifties, culminated in the sixties in a civil war in which one side repudiated the federalism of 1787 and both ignored the democracy of

CIVIL WAR  
CAUSES  
SET-BACK

1835. The period of the civil war was the nadir of federalism as a principle both within and without the United States. Switzerland clung to hers but could not strengthen it, and nowhere else was it active. Democracy too was

under an even darker cloud than in the fifties, for Bismarck had appeared with his *Lückentheorie* and his prescription of blood and iron for the ills of state, and Bismarckian tactics toward the people and their representatives became the fashion. It was not until after 1865, when the federal principle had re-emerged in the United States in a mangled form more suited to the needs of a new age, and when democracy had found a martyr and a patron saint in Abraham Lincoln, that the ebbing tide began to turn. By 1867 the two principles were advancing again, with the acceptance of the new form of federalism (but more logically applied than in the United States) by Canada, with its adaptation to the needs of Bismarck's North German Confederation and attempts to apply it to the solution of the perennial Hapsburg problem in the *Ausgleich*, and with gestures in the direction of democratic government in the shape of the second British Reform Act and the initiation of the *Empire libéral* in France.

But much had to happen in the United States, as elsewhere, before this new era of confidence could begin. Though amputation was avoided, the gangrene of sectional antagonism took a long time to eradicate, and in the alleged interests of the body politic the member states were long kept in a condition of paralysis, to emerge permanently shrivelled, and (in the view of Southerners) repulsively deformed.

The constitution of the Confederate States of America, which appeared early in the civil war as the expression of the governmental aspirations of the eleven southern states that seceded from the union (even before the act of secession was in some cases proclaimed or Fort Sumter had been bombarded) challenged the federal constitution on its own ground and professed to be an improvement upon it. This confederate constitution was published on March 11, 1861, and went "permanently "

CONSTITUTION  
OF THE  
CONFEDERACY,  
1861

into force in the eleven states on February 18, 1862, but as a possible alternative programme for the future constitutional development of the United States it suffered from certain disabilities. First of all, it never purported to be framed with the whole of the United States in view; it was one of the instruments of secession and partition and did not envisage any future extension to the non-slaveholding states, as did the Frankfurt constitution of 1848 to Austria, the constitution of the North German Confederation of 1867 to southern Germany and the constitution of Eire of 1937 to the Six Counties. Then, also, it tended to reflect past controversies and to perpetuate certain traditional Southern *mores* rather than to anticipate possible development of the situation in the eleven states in new directions; it was very clearly, and far more so than the constitution of 1787, the creature of the generation that framed it, and it breathes their more ephemeral prejudices as well as the broader spirit of the South.

In many respects the Confederate constitution follows the constitution of 1787 closely. Its structure is the same, and any section or clause of the earlier constitution to which no exception is taken is incorporated *verbatim*. Thus it reads superficially as a parody of 1787. Yet its intention, despite its President, its Senate and its House of Representatives, its Supreme Court, the suspensive veto of the President, the guaranteed republican form of government and the residual power left to the separate states, is quite different, and it cannot be taken even at its face value, because a Supreme Court was never organized, and in other directions too it never properly came into force; for it was designed, not for the emergencies of wartime, but for the South when those wayward sisters should have departed in peace. It set up a diffused type of government entirely unsuited to the needs of a people fighting a war of independence, and during the war

FOLLOWS  
CONSTITUTION  
OF 1787  
CLOSELY

it was ignored or supplemented by such informal arrangements as the military and civil situation of the South seemed to demand. The outcome of the war meant that it never was to have a chance of normal existence.

As was only to be expected, states' rights were insisted upon. "We the people of the Confederate States, each state acting in its sovereign and independent character" begins the preamble, and in the body of the constitution state legislatures were allowed to impeach confederate officials operating in their territory, while state officials were not bound by any oath to the Confederate constitution. In the sphere of the Confederate government, though the main features of the executive, legislature and judiciary of 1787 were borrowed, the careful attempt to achieve a balance of these powers was not emulated. Leaving out of account the Supreme Court, which existed only on paper after the attempt to organize one in 1863 on the model of the Union Supreme Court had been defeated by the fear of the states that it would be used as a lever for centralization, the balance between President and Congress was considerably upset in favour of the former by giving him a longer term of office (six years), though rendering him ineligible for re-election, by allowing him to veto particular appropriations in a money bill while approving others in the same bill, by requiring a two-thirds majority for any congressional appropriation of money not first proposed by the executive, and by allowing members of the President's cabinet to sit in either house of the legislature. The President's hand was also strengthened against the legislature by the fact that no one bill could refer to more than one subject, and thus omnibus and tacking legislation was not possible. Lord Acton characterized these changes in the position of the President as "improvements alone worth a revolution", but in effect they made the President only the strongest arm of a government

STATES' RIGHTS  
INSISTED UPON

PRESIDENT  
STRENGTHENED  
AGAINST  
LEGISLATURE



inherently weak. He could be more active in a more limited sphere of action than the President of the United States, but there is not much consolation in being made manager of a business without customers, and prevented from securing any.

The enumerated powers of Congress are, in the main, those of the Congress of the United States, but certain significant amendments reflect the constitutional history of the Union between 1787 and 1861 and the ideological struggle of the South with the North. A Confederate protective tariff is expressly forbidden by the provision that "no bounties shall be granted from the Treasury, nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry" (article I, section 8, paragraph 1). Confederate appropriations for "any internal improvements intended to facilitate commerce" are likewise prohibited (article I, section 8, paragraph 3). Although "The importation of negroes of the African race from any foreign country other than the Slave-holding states or territories of the United States of America" was forbidden, it was also declared that no law "denying or impairing the right of property in negro slaves shall be passed" (article I, section 9, paragraph 3).

Thus the "peculiar institution" and the particular taboos of the South were enshrined in its separate constitution, and the defeat of the Southern cause meant that the constitution of the Confederate States of America was to become fossilized almost before it had begun to exist. It is as a fossil of the political attitude of the South, as it had developed during three-quarters of a century of chafing against implications that had been discovered in the federal constitution of 1787, that it has its chief interest. Intrinsically its worth is not great. It was too hastily drawn up, too much a product of the passing moment, probably to have satisfied even a victorious

ENUMERATED  
POWERS OF  
CONGRESS

FOSSIL OF  
A POLITICAL  
ATTITUDE

South for long. For a defeated South it was an impediment concerning the abandonment of which there was no choice, but if there had been, it is pretty certain that Lee's men would have preferred to keep their horses. It did not need reconstructing out of existence, it simply faded away, and even the deep South has spared it no nostalgic thoughts.

Of more far-reaching significance are the mutations forced upon the federal constitution itself, in the North during the war and throughout the whole country during the reconstruction period, for it emerged from this war and post-war period altered in emphasis if not in form, and became in consequence an instrument far removed from what the convention of 1787 had intended or the *Federalist* had expounded. It was redefined and overhauled. Its body was virtually the same, but the power that motivated it was different. With the disappearance of state sovereignty a score or more of lesser impulses were consolidated into one, and despite the cracks that the civil war left for time to fill, the American nation-state now spoke with more authority than the American nation of states of pre-war days could ever have done. It remained to be seen what use would be made of this new imperative.

In the sphere of the Union government of the North the constitutional history of the war resolved itself into a struggle between the executive and the legislature. Armed with the wide authority that the constitution gave him as commander-in-chief in time of war, President Lincoln attempted actually to control operations, but Congress, jealous of this authority and the use made of it, attempted through its committee "on the conduct of the war" to do the same. The none too brilliant succession of commanders of the Northern forces were thus bombarded with orders and advice from two directions, and they were at times more embarrassed by this attention

FEDERAL  
CONSTITUTION  
ALTERED IN  
EMPHASIS

STRUGGLE  
BETWEEN  
EXECUTIVE  
AND  
LEGISLATURE

from behind their own lines than by the guns and raids of the Confederates. No previous war of the United States had been fought, as it were, with Washington as a grand-stand, and during its course the constitution of 1787 was revealed as an instrument that left an uncomfortable no man's land between President and Congress, just as the sectional differences from which the war had sprung had revealed one between the states and the federal government. President and Congress were competitors for the filling of both vacancies ; each sought to take the initiative in coercing the seceded states ; each sought to assume the whole of the additional federal authority for which the defeat of states' rights left room.

During the war the executive tended to predominate and in the post-war or reconstruction period the legislature held the whip hand, while the Supreme Court, fallen from its high estate of the days of Taney (and even further from the days of Marshall) fell into a position of insignificance from which it took long to recover. The balance of power between the three arms of the federal government was shattered, and when the time came to attempt to put it together again, not all of the pieces were to be found.

The restraints imposed upon civil liberty during the war were usually executive acts (though in some cases, as with the suspension of *habeas corpus* in military areas in 1862, these acts were subsequently approved by Congress) and one of the constitutional consequences of the war was a very large increase in the power of the federal executive, which Congress immediately and the Supreme Court somewhat later attempted to reduce. But though the different organs of the federal government might dispute about the right to exercise these powers, they were not inclined to let them lapse or to revert to the separate states. Indeed nearly all the new powers, except

FEDERAL  
POWERS  
ENLARGED

those of arbitrary arrest and the use of arbitrary tribunals, became permanent or else provided precedents for future advances of the federal power. War finance and the war levies of men for the forces, gave to the federal government prestige in the financial sphere and control over the militia that did not disappear with the coming of peace, while the precedent for a federal income tax (which did not achieve the unassailable position of sanction by constitutional amendment until 1913) was set. The enlargement of existing powers (as in interstate commerce regulation) was not followed by a corresponding contraction, and the federal government was able to dig itself into the supervision of the new field of railroad (particularly transcontinental railroad) development. The function of protecting the four million enfranchised negroes given to the federal authority by the thirteenth, fourteenth and fifteenth amendments to the constitution, when added to these other less formal extensions of its power, meant that at the end of the eighteen sixties the United States of America meant something rather different as a governmental concept than at the beginning. The old doctrine of divided sovereignty to which so many American statesmen had subscribed, and to which probably a majority of the convention of 1787 would have adhered had the issue emerged clearly to them, was now dead. The right to secede and the right to nullify had been defeated in the field, and the defeat was registered in the courts and in the council chambers of the country. For the first time a truly national *régime* could be said to exist. An American nation-state had come into existence, to which the separate states were ultimately subordinate, though in normal times they still wielded considerable authority, while the residual power (unlike that in the new Canadian federation) remained with them. The scales, after balancing uneasily for three-quarters of a century, had come down on the side of the nation as a single entity.

DIVIDED  
SOVEREIGNTY  
DEAD

The Union was a drag-net, and once a state was in it there was now, it was finally demonstrated, to be no escape. The holes to which Calhoun had pointed now no longer existed, even in theory. The mesh was made far closer after the recapture of the eleven states of the Confederacy. "One good thing — among other inestimable blessings — which the suppression of the rebellion secured for us", wrote J. L. Motley in 1866, "is that the words confederacy and confederate have become odious in the American lexicon, as they ought always to have been." The word federation did not become odious too, but it did acquire with this new synthesis, a new meaning alien to the pages of the *Federalist* and Tocqueville, alien to the ideas of Jefferson and Jackson, if not of Alexander Hamilton, and it was in this new meaning that it re-acquired popularity among the states of the world.

If the period of the war itself may be regarded as the innings of the President, the reconstruction period was that of Congress. For the first time, a second section was added to a constitutional amendment when the thirteenth amendment was drafted and adopted in 1865, and this new section read "Congress shall have power to enforce this article by appropriate legislation". Such a

DIFFERENCES  
CONCERNING  
"APPROPRIATE  
LEGISLATION"

section in virtually identical wording was also appended to the fourteenth and fifteenth amendments. Congress had wide ideas concerning what was appropriate, and if the President or the courts had different ideas, who was to judge between the three authorities? Not for twenty years, during which Congress had attempted to impeach a President and to muzzle the Supreme Court as "an institution which defies the people's will" did these efforts to establish a sort of legislative sovereignty cease. Through the Reconstruction acts, the Enforcement acts, the Klu Klux Klan act, the Tenure of Office act and other measures, Congress wielded for a time enormous

and virtually unbridled power. The President might veto legislation, but if it were then passed over his veto he was required to enforce it, and it could come under the review of the Supreme Court only in the piecemeal way of appeals in specific cases. Congress, in the name of the majority of the people of the United States of which it could claim its decisions to be the instruments, was able to attack the Rule of Law which the constitution of 1787 had sought to establish and safeguard.

Only with difficulty, and only after the end of the two terms of office of President Grant (whose views on reconstruction and on the enforcement of the new amendments in the South made him more complacent about the policy of Congress than Johnson had found it possible to be) was Congress forced to recede somewhat from its aggressive attitude toward the balance of the constitution. After the elections of 1876 Congress began to acquiesce somewhat in the undoing of the more extreme measures of the reconstruction era, and in a watering down of the effect of the three new amendments. But the instrument of the reaction was not the President; it was the courts. Decisions of the Supreme Court (whose sting Congress had not been able to draw) began to whittle down the effect of Congressional Reconstruction just as, earlier (as in *ex parte Milligan* in 1865) they had succeeded in denying the validity of some of the President's more arbitrary wartime powers. The cases of *The United States v. Reese* and *The United States v. Cruikshank*, both decided in 1876, were followed by no new enforcement or civil rights acts, and the thirteenth, fourteenth and fifteenth amendments remained shrunken to an extent that permitted continued discrimination against, and disfranchisement of the coloured population to be practised, as the "Carpet Bag" era came to an end in the South. The negro slaves had been freed and their theoretical right to vote was established, but any form of discrimination other

CONGRES-  
SIONAL RE-  
CONSTRUCTION

than "on account of race, color or previous condition of servitude" was now permissible, and many were the ingenious forms elaborated.

Yet this reconstruction era, like the war, left its indelible mark on the constitution, and in many other

CONSTITU-  
TIONAL CON-  
SEQUENCES OF  
THE RECON-  
STRUCTION  
ERA

places than in the three amendments. The tendency toward undivided and more purposeful national sovereignty, wielded by the people's chosen representatives, acquired great momentum, and despite the many high-handed and low-principled actions of the reconstruction governments, despite the denial of elementary democratic rights in the heat of reconstruction, the federal idea survived all these vicissitudes to acquire new prestige with the enfranchisement of the coloured population and the growing influence in national affairs of the radical communities of the new West. The sectional struggle of North and South had ceased to be a central issue in American affairs almost before the conclusion of the war. Already the original thirteen states were in a very definite minority, and the formative developments of the nation were taking place more and more, not only beyond the Appalachians, but beyond the Mississippi and even beyond the Rockies. The reconstruction of the South mattered a great deal both above and below the Mason and Dixon line, but in the mining camps and the wheatfields and on the ranges, in Colorado and California, in Montana and the Dakotas, there were other things to think about. For the nation as a whole it was the by-products of the reconstruction era that mattered more than all the things that Congress had directly tried to do, the President to check or the courts to neutralize. The wide interpretation of the "equal protection of the laws" of amendment 14 came quite to obscure its original intention of protecting the negroes of the South, and the deprivation of rights clause came to be invoked in every kind and sort of circumstance in

every part of the Union. The incursion of the federal government into the business of protecting the constitutional rights of the citizen has perhaps proved to be the major permanent constitutional effect of the whole Civil War and Reconstruction era. The whole attitude toward personal rights has been altered in the United States since Lincoln's Emancipation Proclamation of January 1, 1863. Before that time the question of civil rights had been in the hands of the states ; since then the federal authority has tended to settle the matter whenever difficulties have arisen. " That government of the people, for the people, by the people shall not perish from this earth " was to become a national concern, and its watchdog the federal government. Federalism and democracy had reached a new apotheosis.



## CHAPTER XVIII

### PRUSSIA AS THE NUCLEUS OF A FEDERATED GERMAN EMPIRE

JENA and Auerstadt had discredited the state of Frederick the Great, and the reforms of the liberation period had resulted in a bureaucratic absolutism replacing pure monarchical absolutism. This "golden age of efficient bureaucratic rule" in Prussia between 1815 and 1847 gave a government that was efficient without being either free or representative, and the agitation for a written constitution and some form of national representation was persistent. The behest of article thirteen of the *Bundesakte* went unheeded in Prussia, and though in 1823 provincial assemblies of estates were set up, there was still no national assembly or even any provision

THE UNITED  
PRUSSIAN  
DIET, 1847

for these to consult together until 1847, when the economic need for a national loan to aid the building of the Prussian Eastern Railway persuaded the government to summon a United Provincial Diet. But the Diet demanded a written constitution and refused the *Ostbahn* loan until its demand was met, with the result that Frederick William IV dissolved it rather than see a "blotted parchment" come between him and the people he believed himself divinely appointed to rule. Prussia's first United Diet was nevertheless a landmark in her constitutional development, and provided a precedent for the second Diet which met in April 1848 in the shadow of the "March Days". This, in its turn, gave way to the popularly elected Prussian national assembly which, paralleling the Frankfurt Assembly, met in Berlin in May 1848.

Frederick William, who, whatever his mental reserva-

tions, had sought to identify himself in the eyes of his people with the constitutional reform movement in Germany by his famous proclamation and by the appointment of the Camphausen-Hansemann liberal ministry in March, had now to agree to accept a constitutional *régime* in his own Prussia, but he was not so powerless that he was forced to accept any constitution presented to him by the national assembly, and in attempting to devise a form of government to which he would agree, the assembly alienated its more radical element and drove the king (not unwillingly) into the arms of the Conservative "Camarilla" of the Gerlach brothers. While Frederick William had been inclined to accept Camphausen's compromise constitution, he could not stomach the more radical Waldeck draft (which omitted "von Gottes Gnaden" from the royal title) of October 1848, and in November (imitating the removal of the Austrian assembly from Vienna to Kremsier in Moravia) the new reactionary government directed the Prussian assembly to meet, after an enforced adjournment, at Brandenburg on the Havel, and when it did not do so, dissolved it on December 5, issuing on the same day a constitution of its own.

This legitimist constitution, which Frederick William considered it good tactics to grant as a counterblast to the activities of the Frankfurt Parliament, did not differ greatly from the draft prepared by the Prussian national assembly, and closely followed the Belgian constitution of 1831 in many respects, but it was declared subject to revision directly a legislature had been elected according to its provisions (which included a popularly elected lower house), and following the attempt of the new legislature to recognize the validity of the Frankfurt constitution, it in its turn was dissolved on April 27, 1849, and the opportunity provided by the growing success of the reaction in Prussia and Germany was seized upon to

PRUSSIAN  
NATIONAL  
ASSEMBLY,  
1848

A LEGITIMIST  
CONSTITUTION  
ISSUED

abolish the short-lived universal manhood suffrage and to set up a system of indirect election, one of the details of which was the notorious three-class franchise that was to persist in Prussia for seventy years. Qualification was on the basis of property ownership, tax payment and official or professional position, and in each electoral area three groups representing equal amounts of aggregate tax payment each selected an equal number of electors, who, in their turn, sitting as one body, elected representatives to the lower house of the national legislature. By this arrangement one of the three classes was practically confined to a few rich voters in each area, who thus had as much weight in electing national representatives as did the larger number of voters in the second class or the still larger number (usually a majority of all voters in the area) in the third class. This ingenious dilution of the representative principle was to be the Prussian monarchy's chief contribution to the science and practice of constitutional government. For the rest, the Prussian constitution hammered out between 1848 and 1850 was a conjugation of the constitutional ideas already given expression in Europe by the generations of 1815 and 1830. Not inappropriately did a pamphlet published in Prussia in 1848 bear the title: "The constitutions of the United States of North America, the State of New York, the Kingdom of Norway and the Kingdom of Belgium, with the draft of the new Prussian constitution as Appendix".

The first legislature elected under the restricted franchise (in August 1849) again revised the constitution in a reactionary direction, dropping among other things the Belgian guarantees for the freedom of the press, and before he could be persuaded to take the oath to the constitution, in 1850, Frederick William insisted on further revision, increasing the number of royal nominees in the upper

THE PRUSSIAN  
THREE-CLASS  
FRANCHISE

REVISED  
CONSTITUTION  
OF 1850

house and restricting the budget rights of the lower. Only then did he give his official adhesion, on February 4, 1850, to the constitution that had been published on January 31. It fell far short of the ideals of 1848. The three-class indirect electoral law had replaced direct election and the universal franchise; the upper house retained few representative features, and in 1854 all remaining elective elements in it were eliminated; the budget law was left vague in article 99, and the army was not placed, as in Belgium, under the control of the legislature, two features that were to constitute elements of the constitutional crisis of the sixties in Prussia; but the adhesion, on the other hand, to the Belgian model in religious matters, although the religious situation was by no means analogous (especially in view of the recent Cologne church crisis), left the way open for future difficulties in that sphere, and contributed not a little to the *Kulturkampf* of the seventies.

The Prussian constitution of 1850 was, indeed, a half-hearted document, and it was interpreted in the most illiberal way possible during the remainder of the personal rule of Frederick William IV (until his incapacity caused the setting up of a regency in 1858), but nevertheless it has great significance, not only because under it Prussia for the first time became a *Verfassungsstaat*, but because it lasted until 1918, and thus remained her form of government through the period during which Prussia was the leading and dominating state in a unified German Empire. With all its limitations it meant that parliamentary government of a sort was set up, with ministers possessing some degree of responsibility and a king who had sworn to observe and maintain a written fundamental law. Had the unlimited absolutism of the eighteenth century or the unfettered bureaucratic *régime* of the first half of the nineteenth century remained in existence in 1871, it would have been much harder for Prussia to assume the leader-

A HALF-  
HEARTED  
DOCUMENT

ship of the new German Empire, or indeed for that Empire to have been created at all. The constitutional state of 1850, with all its shortcomings, was a direct consequence of the strength of the movement of 1848, and was a forerunner of the movement of 1867 to 1871. By contrast, Austria still remained forty years behind Prussia in governmental organization after 1850. The 1848 movements gave to her the permanent abolition of serfdom and feudal privilege (which Prussia had eliminated in the period of the Stein-Hardenberg reforms), but they did not produce a permanent constitutional régime, for the constitution granted by Francis Joseph in 1849 was abolished in 1851. As a *Verfassungsstaat*, in accordance with the prevailing ideology of the middle nineteenth century world and of mid-nineteenth century Germany, Prussia had a very considerable advantage over her rival, where absolutism still reigned, in the final stages of the dualistic struggle. A state that could not set her own house in order was hardly as ripe for the leadership of a united Germany as one whose house erred only in the direction of being rather too orderly.

Prussia's advantage was, nevertheless, by no means immediately apparent, and the attitude of her king forced her to continue to play second fiddle in Germany for a while. Her attempts in 1849 and 1850 to sponsor a German constitutional scheme more effective than that of the old *Bund* but less radical than that of the Frankfurt Parliament, were received coldly by the lesser states and with open hostility by Austria, who had as little desire to see the king of Prussia as Radowitz' president of a college of German princes as she had to see him Gagern's "Emperor of the Germans". A minority of one in Germany and badly outmanœuvred in the Hessen-Kassel crisis, Prussia found herself consenting at Olmütz in 1850 to the revival of the old German *Bund*, and was unable at the Dresden

A PERMANENT  
CONSTITU-  
TIONAL  
RÉGIME

REVIVAL OF  
OLD "BUND",  
1850

conference of the following winter to secure its reform in any effective way. The restored *Bundestag* complacently allowed the infant German navy, the freedom of the press and "The Fundamental Rights of the German People", all achievements of the 1848 movement, to go on to the scrap-heap, but though an era of reaction followed in nearly all the states of the *Bund*, it was not quite the age of Prince Metternich all over again. Austria was never able to press home her advantageous position at Olmütz, and from 1851 (when her own short-lived constitution was abolished) onward she was to encounter the persistent and successful opposition of Prussia (now represented by the young Count Bismarck) to all her schemes for dominating the *Bund*. For fifteen years Austria and Prussia sat glaring at each other across the table of the *Bundestag*, the chequer-board of a chronically disunited Germany between them registering an unbroken stalemate. The *Nationalverein* of 1859 failed to put through its scheme for an effective central government for Germany, then Prussia's attempt at the creation of a true federation was blocked by Austria in 1861, and Austria's reform policy at the Frankfurt *Fürstentag* of 1863 was foiled by Prussia. The vicious circle was only finally broken by the Austro-Prussian war of 1866, after having been bent to breaking-point in the Danish war of 1864.

CRISIS OF  
GERMAN  
DUALISM

This final crisis of German dualism followed a pattern oddly inverted in form as contrasted with the contemporary crisis of dualism in the United States of America. The parallelism between the problem of North and South in the United States of America and of Prussia and Austria in Germany was by no means a complete one; nevertheless, there were some similarities, and the two problems were solved in successive years — 1865 and 1866 — with in each case the drift of a decade toward

COMPARISON  
WITH  
AMERICAN  
SECTIONAL-  
ISM

the apparently inevitable crisis. The Austrian triumph at Olmütz in 1850 ushered in the last phase, just as did the "compromise" of the same year in America, and after the problem had been solved by resort to force, there succeeded in each case a period of "reconstruction", leading in Germany through the North German Confederation to the Bismarckian Empire, and in America to the restoration of the Union, with the institution of slavery eradicated and the principles of secession and nullification excluded from a more closely consolidated federal state than had previously existed. The differences between these two dualisms were as striking as their similarities. Austria is more to be compared with the South; each had her "peculiar institution", in one case slavery, in the other the non-German lands; each had a long-established pre-eminence, challenged by the development of a more northerly and hardier rival. But while Austria, at the crisis, had to be forced against her will out of the old union, the South had to be forced to stay in, and it was Prussia who, in 1866, resorted to secession to bring matters to a head.

The conflict between the rival Greater German and Lesser German schools of thought had, of course, no close parallel (except during the actual existence of the Confederacy) in America. Both schools (as opposed to the small group that continued, usually in exile, to favour a great unitary German republic) were federalists. The *Kleindeutsche* favoured a monarchical *Bundesstaat* possessing a strong central authority, with Prussia at its head and Austria excluded, while the *Grossdeutsche* desired a monarchical *Bundesstaat* of a looser nature, with a much weaker central authority, so that both Austria and Prussia could be members, yet neither predominate. The former favoured a rather more consolidated federation than existed in the United States before 1865, and the latter desired little more than a *Staatenbund* slightly more effective than that

RIVAL  
GERMAN  
SOLUTIONS

of 1815 or of the Articles of Confederation. Consequently the constitution of the United States of America began to present itself as a middle way for Germany — until America's own dualism split the Union for a time into two warring factions. The secession of the South and the American Civil War undoubtedly caused a great set-back to the prestige that the federal system of the United States had enjoyed in Germany, and it remained in the shadow for the course of the conflict. Germans were perplexed. Even Bismarck wrote in a letter to Motley in 1863, "What *are* you fighting about? Do you know?"

But if Bismarck really did not know what the Americans were fighting about, he certainly had a clear perception of the constitutional battles on two fronts — the Prussian and the German — that he was himself waging, and that he brought to a simultaneous and successful close in 1866–67. In Prussia the reaction between 1850 and 1858 had done its best to drain the spirit of 1848 out of the body politic, but the liberal movement was still active enough and the middle classes newly admitted to a share in political power were already strong enough to desire it in reality as well as in appearance. In consequence the weight of numbers began to tell against the small but vigorous reactionary party, and in 1858 began what was called "the New Era" in Prussia with the dismissal of Manteuffel and the calling in of Auerswald as Minister-President. The Regency was a period of good feeling and hope of reform, but by 1860 the Prince Regent had been convinced by his war minister, Roon, of the urgent need for the reorganization and increase of the army (still governed by a law passed in 1814), and liberal opposition to such changes merely convinced him that he must not let the defence of the state depend upon the will of an elected body. The new Progressive party of left wing liberals openly demanded, at the outset of

PRUSSIA IN  
"THE NEW  
ERA"



the new reign (Frederick William IV died in 1861), both parliamentary control over the army and constitutional reform in the direction of a more popular form of government, and in March 1862 the intractable lower house was dissolved and the New Era ministry dismissed. Elections only produced a further swing to the left in the membership of the lower house, and all bills involving army reorganization were rejected. It was at this juncture that Roon judged the pear to be ripe and Bismarck was called in by the distracted king. Bismarck's steam-roller tactics with the legislature and his elaboration of the theory that any gap or vagueness in the constitution

BISMARCK  
AND THE  
PRUSSIAN CON-  
STITUTIONAL  
STRUGGLE

could be filled in by the government acting on its own, made it possible to reorganize the army and to continue to raise taxes in the teeth of a continued policy of legislative non-coöperation. The *Fortschrittspartei* began to lose ground, and finally the Austro-Prussian war, in which the reorganized army was called into action, provided the opportunity for an outburst of patriotic fervour which finally disrupted it. A complacent country was now willing to let a bill of indemnity legalize Bismarck's defiance of the niceties of the constitution, and the legislature sank back into the subordinate position that the triumphant monarchy, bureaucracy and army considered to be its proper place in the Prussian state. The spearhead of German unification was not to be blunted by speechifying and majorities.

Though "from the standpoint of constitutional history the story of German unification cannot be told", it was necessary for the fact of unification to be recognized in

CONSOLIDA-  
TION AND  
FEDERATION  
IN GERMANY

constitutional form, because the process was not to be complete consolidation into a unitary state (to which the Prussian constitution could have been extended as was the Piedmontese to all Italy), but in part consolidation (the annexation by Prussia of Hanover and certain other

north German opponents in 1866) and in part federation. Prussia's German allies in 1866 could not be annexed, and the neutral southern states could not even be incorporated in the federation dominated by her until 1871, when they drove as hard a bargain with Bismarck as they dared. It was essential that the terms on which first the north German and then the south German states would unite with Prussia in a German federal state which excluded Austria, should be carefully drawn up, for, as always, they did not (and Bismarck knew that they did not) trust either her or him.

The constitution of the North German Confederation of 1867 has been called "an attempt to weld together the *Bundesakte* and the Frankfurt constitution", but it is also characterized by the determination to have nothing to do with certain leading features of either. Quite

NORTH  
GERMAN CON-  
FEDERATION  
OF 1867

apart from the much more modest territorial extent of the North German Confederation (it included only the states north of the river Main, and made no hopeful yet despairing gesture toward Austria) it achieved a distinctly lesser degree of consolidation than would have the Frankfurt constitution of 1849. It differed also in the nature of its origin from the earlier constitution, for the 1849 document had been the work of popularly elected representatives of the people and was only submitted to the separate states of Germany after being proclaimed, whereas that of 1867 was the work of Bismarck himself, aided to an indeterminate extent by a small number of informal advisers such as Delbrück, Savigny, Duncker and Bucher, but modified on certain points before promulgation at the request of the separate states.

A lesser degree of unification was achieved than the Frankfurt constitution of 1849 (or Bismarck's own cynical "unity programme of 1866") would have secured, but the North German Confederation, despite its territorial

limitations, marked a distinct step forward from the *Bund* of 1815 in the direction of a German national and federal state. National legislation was made superior to state laws within the sphere of the federal authority, and equal and uniform civil rights were given to all North Germans living within the boundaries of the Confederation. Argument immediately arose, and continued throughout the life of the North German Confederation and of the Empire which succeeded it, concerning whether it really set up a true federal state. The constitution was itself not explicit, but the circumstances of its founding and the sum of its provisions make it clear that it was intended by Bismarck to go beyond the Articles of Confederation or the Swiss pact of 1815, and to resemble the American constitution of 1787 and the Swiss constitution of 1848 in drawing the line between federal and state authority.

A GERMAN  
FEDERAL  
STATE  
CREATED

Directly after the list of member-states (article 1) the federal law is declared superior to state laws (article 2), an echo of the American "supreme law of the land", and common citizenship and civil rights are provided for (article 3). The legal competence of the federal government is then defined, and while it is not so extensive as under the Frankfurt constitution of 1849, it does include the railway and the postal systems of the whole country, which Frankfurt did not. In the *Bundesrat* (the upper house, representing the states individually) separate standing committees were to be set up to deal with the various fields of federal authority (article 8), including the army, the navy, customs, commerce, railways and posts and judicial affairs. The practice which had grown up in the American Senate without any prompting from the constitution, is here seen crystallized in actual constitutional form, a tendency which has also been discerned in the new Swiss federal state.

The presidency of the confederation was vested in the crown of Prussia (article 11) and a federal chancellor

(*Bundeskanzler*) was to be president of the *Bundesrat* and actual head of the government (article 15). He was to be appointed by the emperor, but nothing was said concerning his responsibility to the *Reichstag* (a lower house representing the people of the Confederation, voting on a basis of manhood suffrage by secret ballot in electoral districts, as provided by separate electoral laws). The safeguards against the "great beast", despite the universal manhood suffrage for the *Reichstag* (article 20), were indeed many. Not only was the ministry responsible only to the president of the confederation, but there was an unlimited veto vested in the president, who had to accept all bills before they could become law, and in the chancellor, who had to countersign and accept responsibility for them (articles 16 and 17). The intermittent debt to the Frankfurt constitution of 1849 is seen very strikingly in article 33, which in very similar words to article 33 of the Frankfurt constitution provides that the Confederation shall form a single customs and commercial unit. The inspiration of both had, of course, been the customs unions of the twenties and thirties, culminating in the Prussian *Zollverein*'s triumph over its rivals which had foreshadowed a political union dominated by Prussia. Federal indirect taxation upon articles produced within the territory of the Confederation was also allowed, but it was denied to the state governments (article 35). A cautionary lesson was learned from 1849 when the navy, which had then been everybody's and consequently nobody's business, was placed, in effect, under the control of Prussia (article 53). There was also to be a united federal army under Prussian supervision, not as an unimportant appendix to the separate state armies, but to take their place (article 62). Another fundamental departure from the principles of the *Bundesakte* came with the restriction of diplomatic

AN IRRE-  
SPONSIBLE  
EXECUTIVE  
BUT  
UNIVERSAL  
FRANCHISE

DEBT TO  
FRANKFURT  
CONSTITUTION

representation abroad to the Confederation alone (article 56). Not even Prussia was to have separate ambassadors, and again an experiment of 1849 (when Prussia merged her representation in certain foreign countries, such as the United States of America, with that of the provisional central government at Frankfurt, by appointing the same individuals when these happened to be Prussians) was developed into a definite system. The constitution could only be amended with the consent of any states individually affected, and only fourteen votes in the *Bundesrat* (Prussia alone had seventeen) were needed against any proposed amendment to secure its rejection (article 78). As amendment was by the ordinary legislative process, a power of veto was here actually given to the president, to the chancellor and to Prussia (as represented in the *Bundesrat*).

The completion of German unification, with Austria and the Hapsburg lands permanently excluded, came with the proclamation of the German Empire of 1871. The Confederation of 1867 was enlarged to include Hessen, Bavaria, Baden and Württemberg, its president, William I of Prussia, became German emperor, and its federal chancellor, Bismarck, became imperial chancellor. The constitution of 1867 was retained, and for the states of north Germany was not changed in any significant way, apart from the change of title. For them it was as the Consulate becoming the Empire, or as the admission of Maine and Vermont, Kentucky and Tennessee to the American union a few years after 1787. The south German states, on the other hand, had not been defeated or overawed in a war. They were, indeed, the valued allies of Prussia in the war against France, and they were the homes of strong particularist traditions. By the November treaties of 1870, they were consequently able to secure concessions which, if not very important, were at least a sop to their particu-

GERMAN  
EMPIRE  
OF 1871

CONCESSIONS  
TO SOUTH  
GERMAN PAR-  
TICULARISM

larism, as the price of their participation in the new Germany, and these concessions, written into the constitution, are really the only significant differences between the text of 1871 and that of 1867. The reserved rights (*Reservatrechte*) allowed Bavaria, Baden and Württemberg to levy taxes on beer and brandy produced within their own territories and disbarred the federal authority from so doing (article 35); Bavaria and Württemberg were allowed to retain their separate postal systems (articles 10 and 52) and their independent armies (articles 68 and 73), with provision for federal supervision to secure uniformity; Bavaria alone was permitted to retain her separate railway system (article 46). Certain concessions insisted upon by the three states affected them specially, but not so exclusively as the *Reservatrechte*. These were the provision that the *Bundesrat* should ratify any declaration of war (article 11) and sanction in advance federal action against any separate state or group of states (article 19); the setting up of a special foreign affairs committee of the *Bundesrat* under a Bavarian chairman, with permanent Saxon and Württemberger representation (article 8); and the declaration that only representatives of those states directly affected should vote in either house of the federal legislature on matters not concerning all the states (articles 7 and 28). Only to the extent of letting it make laws regarding the press and the right of association was the competence of the federal authority under article 4 of the constitution (section 16) extended. All the other changes were in the direction of either limiting or more closely defining its existing powers, though nothing really vital was taken away from it. The inclusion of the three southern states and Hessen also meant that the *Bundesrat* was increased from 43 to 58 members, and the *Reichstag* from 297 to 382, but the fourteen-vote veto in the *Bundesrat* on constitutional changes was not altered, and this gave Bavaria, Baden, Württemberg and Hessen, acting together, a negative similar to that previously enjoyed

by Prussia alone or by a combination (very difficult to achieve) of a multitude of the petty one- or two-vote states. (In the North German Confederation only Saxony, with four votes, stood outside this class. In 1870 Bavaria received six votes in the *Bundesrat*, Württemberg four, and Baden and Hessen three each.)

This none too delicate balance of forces between emperor (representing the old authoritarian tradition),

A BALANCE  
OF FORCES

*Bundesrat* (representing the particularist tradition of the separate states) and *Reichstag* (representing the new popular aspira-

tions), with the imperial chancellor riding the fulcrum as best he could, lasted without major structural change until nearly the end of the Hohenzollern empire. Article 19, with its provision for sanctions against separate states, was never used in this way. Actual amendments were few and unimportant. The period of the *Reichstag* was altered from three to five years in 1888 and the *Reichsland* of Elsass-Lothringen was given representation in the *Bundesrat* in 1911. Far more important were developments resulting from interpretation of the constitution and from the procedure of successive governments under it, though these did not find their way into its text. These developments may be summed up as a progressive decline in the significance of the *Bundesrat* (which might have become the pivot of the constitution if things had run in the other direction) and the complementary

UNITARY  
TENDENCIES,  
1871-1918

tendency in the direction of a more unitary form of state-organization for the whole empire. The emperor and chancellor were

able to dominate the *Bundesrat*, particularly through their direct control over the large block of Prussian votes, and the *Reichstag*, with its democratic election at least every five years, the publicity of its open debates and its party strife, easily managed to outshine in the public eye a *Bundesrat* deliberating secretly and consisting in the main of unknown figures, despite the constitutional power of

the *Bundesrat* to demand the dissolution of the *Reichstag* and of its members to be heard in it. The foreign affairs committee of the *Bundesrat* (such a feature of the compromise of 1871) remained inactive, and in foreign policy first the chancellor and then, after Bismarck's removal, the emperor himself gave the keynote to foreign policy. The Yellow Peril, the Place in the Sun, the Future on the Water and other resounding landmarks in the relations of the German Empire with the world, were all conceived without assistance from the foreign affairs committee of the *Reichsrat*, and, indeed, without its knowledge. Colonial policy too, when that became important, was not an affair of the *Bundesrat*, and in the government of the new colonies the legislature did not participate. The *Reichsland*, consisting of the provinces of Alsace and Lorraine, ceded by France in 1871, came directly under the federal executive, and did not achieve representation in the *Bundesrat* until 1911. Unitary tendencies were many. Commercial and criminal law were made uniform throughout the *Reich*, as was later the civil law; a national supreme court was set up at Leipzig in accordance with the promise of article 75 of the constitution; the courts were made uniform, as was also legal procedure throughout the *Reich*. The economic unity of the country was completed by the entry of Bremen and Hamburg (specially excepted in 1867 and 1871) into the general customs and tariff system of the country in 1888, and superimposed on all this came the advanced social legislation of the *Reich* in the later Bismarckian period and the development of the *Reich* war and naval departments, the postal system, the department of justice and the colonial office, as the German Empire gradually expanded into a larger and larger place in the sun.

The new empire inherited Prussia's difficulty in reconciling parliamentary control over the army with methods of organization and reorganization desired by the war ministry and the higher command, but a com-



promise was reached in 1874 which provided for army appropriations to cover seven years at a time, and though army increases could only be secured, even with the *Septennat* working, in 1887 and again in 1893, by the *Reichstag* first being dissolved and replaced by one more amenable, a major constitutional crisis, such as that of the sixties in Prussia, was avoided, though it was a period of ever-increasing military and naval expenditure. An important fresh source of national revenue was secured when a federal income-tax law was passed in 1913.

But the Empire remained anti-democratic in outlook right up to 1918, when a last minute bid for popular support in a moment of national distress forced the government to offer reforms that the liberals and radicals had long demanded without effect. In Prussia the abolition of the three-class franchise was promised, but in the Empire, where universal suffrage had existed from the beginning without being accompanied by responsible parliamentary government, the withdrawal of article 9 of the constitution of 1871 (which prevented members of the legislature from being ministers) was demanded. The emperor declared on September 30, "I desire that the German people collaborate more effectively than heretofore in the determination of the fate of the Fatherland", and the new chancellor, Prince Max of Baden, said on October 5, "When peace comes, a government cannot again be formed which does not find support in the *Reichstag* and does not draw its leaders therefrom". On October 18 the constitution was amended by repealing section 2 of article 21 (which had required ministers to give up membership of the *Reichstag* upon appointment) by adding to article 15 (to make chancellor and ministers responsible to the legislature) and altering article 11 (to place war declarations, treaties and military and naval

CONSTITU-  
TIONAL  
COMPROMISE  
OF THE  
"SEPTENNAT"

PENULTIMATE  
PROMISE OF  
A LIBERAL  
EMPIRE

appointments under legislative supervision). But such concessions came too late, and on November 9 the dynasty fell. Germany was not to see the phenomenon of a democratic empire, but was to suffer another "year of revolutions".

## CHAPTER XIX

### HAPSBURG SYNTHESIS—PROCESSES OF SOLUTION AND DISSOLUTION

THE persistence of the system of Metternich in the territories of the Emperor of Austria made any constitutional approach to the problem of governing this

THE SYSTEM  
OF METTER-  
NICH

heterogeneous state, in a way that would give lasting satisfaction to all of its many peoples, impossible before 1848. Metternich himself, unlike his nominal master Francis I (who opposed railway development because he thought it would bring revolution into the country) was not impervious to the need for improvement in the empire, but he set his face against this taking the shape of political reform. He was, in a way, enmeshed in his own web. Having accepted the dynastic premises of the Hapsburgs regarding their dominions, he was forced to use the Hapsburgs' own peculiar logic in dealing with every problem, and the structure of the monarchy remained so static over a whole half century that all institutions tended to be bureaucratized to death and the empire became, as Redlich has pointed out, congenitally impervious to new thought and new ideas.

The Hapsburg empire survived into the era of the nation-state as a state comprising many nationalities,

LACK OF  
COHESIVE  
FORCE IN THE  
HAPSBURG  
EMPIRE

but lacking the cohesive force that would bring these together as the Swiss cantons, the United States of America, the Italian states and the other German states were eventually given unification. The Hapsburg dynasty, which by ability, astuteness and good fortune, had amassed this vast and heterogeneous dominion by the

end of the seventeenth century, found itself deserted by all three of these qualities when it had to turn to the much more difficult task of synthesizing its territories and giving their peoples some common purpose. The great Turkish fifteenth and sixteenth century invasion of central Europe may have postponed the possibility of synthesis for two hundred years and retarded the development of the Hapsburg realm as a state far behind that of the other new monarchies, but it also provided the Hapsburgs with a mission to free Europe from the Turks and with a frontier region (as the Ottoman power receded in the seventeenth and eighteenth centuries) where ancient racial antagonisms and feudal anachronisms could be liquidated. But this opportunity was lost, for the peoples who were freed from the yoke or the fear of the Turks found that they had only exchanged oppressors. The ancient liberties of the Czechs, the Magyars and other peoples were trampled upon ; the pretence of protecting the common man against the feudal nobility was given up ; the dynasty which might have made itself national came to be regarded as alien almost everywhere that it ruled.

Geographical and historical advantages of very great promise were thrown away. When uncomfortable outlying possessions such as Switzerland, the southern Rhineland, the southern Netherlands and north Italy had been gradually shorn off, when the dead weight of the Holy Roman Empire had been removed in 1806 and the fatal fascination of domination in Germany had been excluded in 1866, the lands of the Danube basin remaining under Hapsburg rule possessed geographical and economic, if not ethnographical, compactness that would seem to justify as strongly as ever before the continuation of the effort to perpetuate in this area a cohesive political system. But the Hapsburgs had long since been outgrown by the task that this would have meant. Even the war against the Turks was regarded by them in its

GEOGRAPHICAL  
AND  
HISTORICAL  
ADVANTAGES

later stages rather as a private campaign than as a national or European crusade. The Hapsburg empire, it has been said, was regarded as a private enterprise of the imperial family. Consequently, to the very end, the emperor would speak of "My house" or "My army" in a manner that was already out of date in the Prussia of Frederick the Great. Any Hapsburg monarch might have declared with sincerity "I am above the state". "I hear he is a patriot for Austria", said Francis I at the beginning of the nineteenth century, "but the question is whether he is a patriot for me." Even the interlude of enlightened absolutism under Maria Theresa and Joseph II was darkened by this fatal dynastic attitude of detachment toward the deep-seated heterogeneity of the empire, and disregard for the rights of its peoples to any form of self-determination. It was simply an interlude of "unite and rule" in a Hapsburg tradition of "divide and rule".

A four hundred year effort to keep together the variegated mosaic of their dominions (which at the break-up contained over fifty million inhabitants and covered over a quarter of a million square miles, comprised ten nations and over twenty distinct nationalities) ended in failure, and cost the Hapsburgs all their crowns, but it is an effort that cannot lightly be dismissed. Their experiment of trying to build up "a kind of universal state", "a supranational monarchy" has been characterized as "one of

the greatest and most interesting attempts in world history", and Jaszi has justified this view by claiming "Had this experiment been successful it would have meant more from a certain point of view than all other efforts of state-building ever recorded. For, if the Hapsburgs had been able really to unite those ten nations through a supranational consciousness into an entirely free and spontaneous co-operation, the empire of the Hapsburgs would have surpassed the narrow limits of the nation-state, and would have proved

DYNASTIC  
OBTUSENESS

A MOMENTOUS  
EXPERIMENT

to the world that it is possible to replace the conscibusiness of national unity by a consciousness of a state community. It would have proved that the same problem which Switzerland and Belgium have solved on a smaller scale among highly civilized nations under particular historical conditions, should not be regarded as a historical accident, but that the same problem is perfectly solvable even on a large scale and among very heterogeneous cultural and national standards."

The applicability of federalism as a possible solution to the Hapsburg problem is so startlingly obvious that it is difficult to realize that such a solution was ignored by the dynasty until the very last month of the existence of the empire, at a moment when the break-up of the empire was already almost complete and its saving beyond human ingenuity. The October decree of 1918, in which the Emperor Charles announced that he would rebuild the monarchy on a federal basis, was even more futile a gesture than the Emperor William's eleventh hour promise of democratic government in Germany, and as useless to the dynasty and the empire as the Archduke Francis Ferdinand's unpublished and redundant "accession manifesto", in which he had expressed his intention to respect the equality of all the nations of the empire and had envisaged the adoption for the Hapsburg empire of a constitutional system analogous to that of the United States of America. In 1914 and in 1918 such things were worthless. In 1814, or even in 1848, and conceivably in 1871, the adhesion of the dynasty to such ideas might have done much. But the long reign of Francis Joseph (1848-1916) saw possibilities of solution deteriorate gradually into the realities of dissolution. The persistent longevity of the ramshackle empire could not disguise the fact that, before the beginning of the twentieth century, its disease was mortal and that all political doctoring had failed.

The dead weight of the Hapsburg "absolutist mon-

FEDERAL  
SOLUTION  
IGNORED

archy without a monarch " (so called after the epileptic Ferdinand succeeded Francis I in 1835) was momentarily lifted by the revolutionary outburst throughout the empire in 1848. The absolutism had, in the kingdom of Hungary, been tempered by the continued existence of ancient and traditional constitutional forms, and particularly by the resistance of the Hungarian diet, and in 1823, in 1832, in 1839 and in 1843 this old feudal body had reflected the growth of the Magyar national revival and of liberal sentiments. In 1847 a newly summoned diet brought forward the "Ten Points" of reform of the progressive parties (which included responsible ministers, popular representation, and the abolition of serfdom) and only escaped being dissolved, as the Prussian United Diet had been dissolved, through the prostration of the Hapsburg government in the March days of 1848. A responsible ministry was set up in Hungary, the ten points became "The March Laws", and the virtual independence of the country was secured.

The liberal and national movement of the Magyars thus fused with the revolutionary wave of 1848, but in the dominions of the Austrian crown there had been no similar development and no similar survival of ancient representative estates. The fall of Metternich and the setting up of a liberal ministry in Vienna therefore found the Austrian peoples less prepared than the Magyars for the new era, and the German-Austrians in particular were torn between their interest in rebuilding the Hapsburg empire as a constitutional state and their desire to participate in the creation of a federal link between the states of Germany. The 1848 movement was as confused in Austria as it was clear-cut in Hungary. In consequence less was achieved, but, by way of compensation, the reaction, when it came, was less savage and less rapid (though no less thorough).

THE  
HUNGARIAN  
DIET AND ITS  
"TEN POINTS"  
OF 1847

AUSTRIANS  
LESS  
PREPARED  
FOR 1848

The first liberal Austrian ministry, that of Pillersdorff, drafted a constitution which attempted in April 1848 to preserve the unitary and indivisible nature of the Austrian state, but this failure to recognize the realities of a situation in which Hungary had demanded and proclaimed her autonomy and in which national risings had already occurred in Bohemia, Croatia, Galicia, Venetia and Lombardy, gave no satisfaction to the radical clamour, and the government was forced on May 9 to summon an assembly or *Reichstag* containing representatives of all the peoples of the Austrian crown. This assembly met in July at Vienna, but racial and national aspirations were too strong to allow harmonious progress. The assembly had a Czech as president and a Pole as vice-president, and a majority of the members were Slavs, a fact most unpalatable to the German-Austrians who had grown used to domination. The breakaway of the Slav representatives, to reassemble separately at Prague, eased this situation, though it did not contribute toward facilitating the task of drafting a federal constitution for all Austria that the assembly was attempting.

DISSENTIONS  
IN AUSTRIAN  
NATIONAL  
ASSEMBLY

The first task had been to abolish serfdom and feudal dues throughout Austria. The second, to provide the Austrian half of the monarchy with constitutional government, was far more complex and by no means so easily understood by many of the delegates. Palacky's plan of a federal state comprising as member states the various territories of the different racial groups in the realm, was considered too radical, and a compromise was reached by which the larger historic territories were preserved, but were subdivided where necessary into different racial districts. There was to be strict national equality throughout the federation, and racial minorities were to be guaranteed protection. The provincial governors were to be responsible to representative elected bodies. This was the first

ATTEMPT AT  
FEDERATION



true attempt to solve the problem of the government of the Austrian heterogeneous state on the basis of national equality and national co-operation, and it was an attempt that owed nothing to the Hapsburg dynasty. Indeed, the dynasty tried only to hamper this work. It adjourned the assembly from Vienna to Kremsier in Moravia (where it would be bereft of the support of the revolutionary organizations of the capital) before it had finished drafting its constitution, and then dissolved it before the constitution could be proclaimed.

The Kremsier draft constitution of the Austrian *Reichstag* of 1848 remains, nevertheless, a notable achievement.

THE  
KREMSIER  
DRAFT  
CONSTITUTION

“Measured both by moral and intellectual standards this document is the only great political monument of the common will for the state which in imperial Austria the people have created through their own representatives” is the judgment of Redlich, and Seton-Watson finds in it “the living proof that the nations of Austria were in that age capable of working out their political salvation, and (it) will remain for all time as a charter of democratic government and inter-racial conciliation”. Yet because it was brushed aside by the newly triumphant reaction when Schwarzenberg persuaded the eighteen year old emperor Francis Joseph to dissolve the *Reichstag* and to issue a unitary and legitimist constitution on March 4, 1849, to take its place, it received scant attention from posterity. “It is a remarkable fact”, bemoans Redlich, writing in 1920, “that during the entire period of seventy years since the constitution of Kremsier was drawn up, not a single monograph study devoted to it and possessing scholarly value has been published.”

Compared with the Kremsier draft, the constitution promulgated by the government of Francis Joseph on March 4, 1849, is a document which makes the merest gesture in the direction of a true constitutional *régime*, and none at all toward the solution of basic problems. The

Kremsier draft had set up a government whose authority was derived from the people, it had given complete religious freedom and had devised a federated system with a central two-chamber legislature as well as local representative bodies. The rule of the majority was to have been accompanied by the protection of minorities and the safeguarding of the rights of the individual. Absolute national equality was proclaimed. The constitution actually given by Francis Joseph to Austria, on the other hand, declared that all authority derived from the emperor, set up an indivisible unitary state and granted only limited religious freedom. It was not limited to the lands of the Austrian crown, but extended to all the territories of the Hungarian crown as well, to the whole Hapsburg realm. Thus Austrian hopes and Hungarian achievements in 1848 were extinguished at one blow. Though there was to be an upper house representing the provinces of the empire, and a lower house with one representative for every hundred thousand of the population, the members of the one were to be mainly nominees of the crown and the members of the other were to be chosen by a very restricted electorate picked from classes most likely to support the *régime*. The whole thing was a travesty of a true constitutional system for the Hapsburg empire, and when it had served its purpose against the Frankfurt constitution which was about to be completed (and which the publication of the Austrian constitution did more than anything else to strangle at birth) it was abandoned (on December 31, 1851) after having been consistently ignored whenever it suited the purpose of the *régime* so to do, and unadorned and unabashed absolutism was reinstated. Thus 1848 served to make of the Hapsburg empire neither a federal nor even a constitutional state, though it did cease to be a feudal state. In the eighteenth-fifties, with the *Bund* of 1815 restored and the short-lived

INADEQUATE  
LEGITIMIST  
CONSTITUTION  
OF 1849

ABSOLUTISM  
REINSTATED,  
1851

constitution abolished, something very like the stabilized absolutism of the era of Metternich appeared to have returned in Austria. But the system of the ministry of Bach was not quite, and could not quite be, the system of Metternich. The revolution in Hungary and elsewhere had been suppressed with savage ferocity and with the humiliating assistance of the Tsar of all the Russians, but serfdom and feudal dues had not been restored, certain administrative, economic and legal reforms had not been reversed, free trade between Hungary and the rest of the empire had at last been established and new railroads and highways were being built. Though their empire may have been a sport of nature, even the Hapsburgs could not escape evolution.

Up to 1859 the "System Bach" was maintained, but the crushing blows to the prestige of the *régime* administered by the military defeats of Magenta and Solferino, not only swept aside Bach himself but rendered it impossible to continue a constitutional policy of undiluted absolutism. By the October diploma of 1860 the intense centralization of the period of reaction was abandoned by the re-establishment of Hungary's ancient constitutional liberties as they had existed before 1848. But this was a reaction against a reaction rather than a step forward, and it satisfied neither the conservatives (whom it was intended to placate) nor the radicals (whose demands it ignored). A new experiment was tried in the February

OCTOBER  
DIPLOMA AND  
FEBRUARY  
PATENT,  
1861-62

patent of 1861, whereby the diploma was set aside and the centralizing bureaucracy returned to. Schmerling (who had been prominently associated with the work of the Frankfurt parliament and provisional government up to the time of the recall of the Austrian representatives) provided a system of local representation, though it was accompanied by no local autonomy. The provincial diets, which elected deputies to a central *Reichsrat*, were themselves elected for six years by owners of landed

estates, chambers of commerce, towns and rural districts. A high tax-paying qualification severely restricted the numbers of those eligible to vote in the towns and villages. This "Curia" system was transparently a device to give the Germans the dominating position, even where they were in a minority, and both the Magyars and the Czechs boycotted the scheme from the first, while the Poles only co-operated for a short while. In 1865, with external as well as internal troubles crowding around it, the *régime* suspended the February patent and restored to Hungary her constitution of 1848. But the outcome of the Seven Weeks' War only encouraged the Magyar and Czech particularists. On the other hand, 1866 forcibly freed the Hapsburg empire from its Italian commitments and its German ambitions, and reduced its territories roughly to the central Danube basin. For a decade the fatal fascination of extraneous territory was withstood, and during this decade probably the last opportunity to devise a governmental system for the empire, that would both work and keep its heterogeneous parts together in some sort of harmony or feeling of common interest, was allowed to slip by. After 1878 the protectorate over Bosnia and Herzegovina embroiled the empire once more, this time in the Balkans, in expansionist thoughts, and diffused its efforts at a time when the domestic problems were so many and so pressing that they demanded the utmost concentration.

The dualistic compromise, or *Ausgleich*, of 1867, involved a policy of partial surrender. Two hundred years of striving to absorb Hungary in a greater centralized Austria, were abandoned in order to enlist the Magyars in the struggle to resist the remaining non-Germanic peoples of the empire. Hungary (including Croatia and Transylvania) was to be all but independent of Austria. She was to have not only her separate parliament, but a separate

OUTCOME OF  
SEVEN WEEKS'  
WAR

"AUSGLEICH"  
OF 1867

ministerial council. A separate Hungarian citizenship, distinct from that of Austria, was to be recognized, and the Magyar language was to be the recognized one in the lands of the Hungarian crown. The partnership between the Germans and the Magyars extended to political, financial and economic arrangements, all based on absolute parity. Sixty members elected by each of the parliaments, Austrian and Hungarian, were to sit annually, alternating between Vienna and Budapest, to deal with matters of common concern, but the two "delegations" deliberated separately in their own languages, communicated their views to each other only in writing, and when they finally met in joint session did so only to record a silent vote. Three ministries for common purposes (foreign affairs, war and finance) were set up, responsible to the delegations. At intervals of ten years the delegations were to fix the quotas of proportionate contribution for these common purposes to be made by Austria and Hungary respectively. The ruler was to be emperor in Austria and king in Hungary, and "Emperor and King" only when the common purposes were involved. It was a division of the empire into two halves, with little more than a personal link between them. Their approximate equality in strength, population and resources made it a link more analogous to that of Sweden and Norway than that of England and Scotland or England and Hanover, and it too was destined to be broken, though not by mutual consent.

#### SYSTEM OF DELEGATIONS

The initiation of this dualistic constitution left one glaring discrepancy in the empire. Hungary had obtained back her constitution of 1848, and a constitutional system now governed the ground of co-operation of the two halves of the empire, but Austria, since the suspension of the February patent in 1865, remained a bureaucratic absolutism. The Hungarians demanded that a constitutional *régime* should be instituted throughout the

empire, and therefore the *Ausgleich* was accompanied by a new Austrian constitution. This constitution set up both representative and parliamentary government, but the horns and tail of Hapsburg statesmanship again showed in the provision (article 14) for the government to issue ordinances having the force of laws, pending the next meeting of the legislature. This article was frequently invoked during the period (1867–1918) of this constitution's existence. But despite such safeguards against unfettered popular rule, the constitution of 1867 was liberal in comparison with any system of government that Austria had previously possessed. It was prefaced by a declaration of the fundamental rights of Austrians, which gave in this sphere (on paper at least) practically all that 1789 and 1848 had demanded. The four-class franchise of 1861 was continued, but the tax-paying qualification was lowered. The competence of the central bicameral *Reichsrat* was very carefully defined (article 11) and residual legislative power (there was not much left) was given to the provincial diets (article 12). The articles mentioned fell within the "Fundamental Law altering that of February 26, 1861, concerning Imperial Representation", but the new constitutional system was rounded off by the issue with it, and all on the same day (December 21, 1867) of three other fundamental laws, providing for an imperial supreme court (*Reichsgericht*), defining the power and jurisdiction of the various other courts of law, and defining the exercise of administrative and executive power in the state.

AUSTRIAN  
CONSTITUTION  
OF 1867

This system was, during the years between 1867 and 1918, modified fundamentally only once, when, in 1907, the four-class franchise was replaced by universal suffrage for all men aged 24 and over who possessed Austrian citizenship and who fulfilled a one-year local residence qualification. The addition in 1896 of a fifth class of

UNIVERSAL  
MANHOOD  
SUFFRAGE  
IN AUSTRIA,  
1907

voters, comprising all male citizens over 24, but electing only 72 representatives to the lower house of the *Reichsrat* (out of a total of 425), had provided a transitional arrangement and again reflected the Hapsburg fear of true popular government. On the other hand, Hungary, who had insisted upon Austria receiving a constitution with a representative system in 1867, as a condition of entering into the partnership of the *Ausgleich* with her, resisted the universal franchise to the end. Despite violent agitation, 1907 saw in Hungary no amendment of the electoral law of 1874, which, after declaring in article 1 that the right to vote "may be exercised" by all male native or naturalized citizens over 20 years of age, proceeded in the remaining 120 articles to whittle down this concession to produce "the most illiberal franchise in Europe".

The national equality and the protection of minorities provided by the draft Kremsier constitution of 1848 was not given by the *Ausgleich*, or by either the Austrian or the Hungarian constitutions in force after that date. This fundamental issue was once again, and unsuccessfully, sidestepped. It has been declared that the dualistic system created two privileged (the Germans and the Magyars) and two mediatized nations (the Poles and the Croats) at the expense of all others in the empire. The compromise between the Austrian emperor and the Magyar feudal classes was accepted by the German-Austrians because it continued their hegemony over the Slav majority in Austria; the Poles, whose votes were needed to give the appearance of a majority (when added to those of the Germans) to the *régime* in Austria, received a large measure of autonomy, and Austrian Poland was handed over to its native nobility; the Croats were given a diet at Zagreb, but their autonomy was more apparent than real. The Czechs and the Serbs and the other Slavonic peoples within the empire received nothing

INEQUITABLE  
TREATMENT OF  
MINORITIES

of any value, causing Palacky to exclaim prophetically "Dualism is the birth day of Pan-Slavism". The second Slav congress denounced the *Ausgleich* and demanded a fivefold instead of a twofold partnership of nations within the empire. A federal arrangement was pointed to as the only feasible solution.

The creation of the German empire of 1871 was yet a further blow to Hapsburg prestige, for the exclusion of 1867 was now doubly underlined, and once again, in order to restore shattered "face", it was considered advisable to win over the disgruntled Slavs. The ministry of Hohenwart, recognizing that all pretence that Austria was a "German" state must now be abandoned, made a gesture in the direction of a federal arrangement. Schaeffle's "Fundamental Article" conceded to the kingdom of Bohemia a wide measure of autonomy through the Bohemian

SCHAEFFLE'S  
"FUNDAMENTAL  
ARTICLE"  
OF 1871

diet, and full equality as between Germans and Czechs was promised throughout the empire. But German and Magyar opposition succeeded in defeating the Hohenwart-Schaeffle scheme, "the only serious and broad-minded attempt between Kremsier and 1918 to solve the problem of the Hapsburg Empire", and the uneasy dualistic compromise remained in force. In the period of a little less than half a century that the sands of the Hapsburg empire had still to run, the "good-tempered dissatisfaction" in which Taaffe sought to maintain all the nationalities of the empire proved a chimera. Ill-tempered dissatisfaction passed into open opposition, not only to the government of the moment, but also (on the part of the Slavs) to the very idea of the continuance of the empire. The annexation of Bosnia and Herzegovina in 1908 more than counterbalanced the Austrian universal suffrage of 1907, for it made the Hapsburg monarchy "the chief obstacle to Yugo-Slav unification". Not only the Serb, but also the Italian and the Rumanian *Irredenta* threatened the empire with disruption, while the Germans, the



Czechs, the Poles and the Ruthenians, though not subjected to the same extent to the pull of rival political nuclei outside the boundaries of the empire, were growing less and less satisfied with their position within it. Only the Magyars, and of them only their governing class, continued to see in the system of the *Ausgleich* anything worthy of the great sacrifices that its survival was beginning to imply, and they were the subject of the open hatred and distrust of the heir to the throne of the empire, Francis Ferdinand, who posed as the protector of the "oppressed nationalities" of Hungary. Just as his assassination was only the occasion for the outbreak of war in 1914, so was the war itself only the occasion for the break-up of the Hapsburg empire, which had already become the scene of the struggle of the Hapsburgs against the growth of national consciousness, and of the different national consciousnesses of the empire against each other. The dynasty thus entered the war with a majority of its subjects against it, and stood within a vicious circle of hostile nationalities. "In this manner", says Bauer, "the circle was drawn. The Hapsburgs began the war against the Yugo-Slavs, passed through it in the most vehement conflict with the Czechs, lost the Poles during the war, and were incapable of winning the Ukrainians. All the Slav peoples now stood against the Hapsburgs." Long before the belated imperial promise of October 18, 1918, that "Our Fatherland should be resurrected as a federation (*Bundesstaat*) of free peoples out of the tempest of the World War", Yugoslavia, Poland and Czechoslovakia existed as independent political realities created partly or wholly at the expense of the integrity of Hapsburg territory. Only an overwhelmingly successful conclusion to the war could have saved the empire after the death of Francis Joseph in 1916, and that was not to be. The carcass of the double-headed eagle was carved into

GROWING  
THREATS OF  
DISRUPTION

WAR OF 1914  
OCCASION FOR  
BREAK-UP OF  
EMPIRE

many parts. Not only Yugoslavia, Czechoslovakia and a resurrected Poland participated in the partition, but also Rumania and Italy. The two heads, looking (as ever) in opposite directions, became the two relatively insignificant sovereign states of Austria and Hungary, linked by no *Ausgleich*, containing only German-Austrians and Magyars respectively, and indeed, not all of those two peoples.

In German-Austria a plebiscite went in favour of a republic, which was established on November 12, 1918, but the desire of the German Austrians to adhere to the German *Reich* was prevented GERMAN-AUSTRIA, 1918 by the victorious allied and associated powers, and the ban was incorporated in the treaties of peace. Austria, therefore, composed of the provinces of Upper and Lower Austria, Styria, Burgenland, Salzburg, what was left of Tyrol and Carinthia, and (after some local hesitation about seeking membership of the Swiss federation) Vorarlberg, and containing only six million inhabitants of which two million lived in and around the city of Vienna, was faced with the need for devising a form of government suited to her new situation. A provisional constitution had set up a democratic federal republic with a single chamber legislature, and after the hope of *Anschluss* had been denied by the treaty of St. Germain, a permanent constitution was promulgated on October 1, 1920. This constitution, the REPUBLICAN CONSTITUTION, 1920 work principally of the political scientist Hans Kelsen, incorporated a complete rationalization of the federal principle, and had the effect of imposing systematic decimation upon a truncated Austria. The division of power between federal and provincial authorities was fourfold. In some spheres (such as foreign relations) the legislative and executive power was reserved entirely to the central authority; in others the federation alone could make laws, but the provincial authorities were to execute them; in yet others the federation could legislate with regard to general

principles only, leaving detailed legislation and execution to the provinces; and finally, all residual matters were exclusively within the legislative and executive competence of the provinces. The central legislature was bicameral, the upper house (*Bundesrat*) representing the provinces separately (but not equally, for according to population

a province could have as many as twelve and as few as three representatives, chosen by its legislature, while the city of Vienna was represented as a federal territory),

and the lower house (*Nationalrat*) directly elected on the basis of complete universal franchise, representing the people as a whole. A federal president, whose office was modelled upon that of the French President, was to be elected for four years by the two houses in joint session, and a federal supreme court was set up. Provincial constitutions were to prescribe the same franchise as the national constitution, the provincial governments were to be elected by the unicameral provincial diets and were to be presided over by provincial governors (*Landeshauptmänner*). The referendum for constitutional changes and popular legislative initiative were provided for, and the democratic nature of the constitution was underlined by making the *Nationalrat* the dominant partner in legislation, leaving the President no veto and the *Bundesrat* only a suspensive one.

This constitution, running to 152 articles and innumerable subsections, resembles in its excursions into minute details and in its tender regard for provincial susceptibilities, the French Girondist constitution of 1793. The large degree of provincial autonomy in such a small state tended to cause difficulties in the troubled post-war era. Minor changes were made in 1925, and a thoroughgoing revision was undertaken at the end of 1929. The federal authority was extended, but the federal legislature lost its dominating position to the executive through having the right to adjourn and dissolve itself taken away,

as well as the right to elect the ministry, the Chancellor and the President. It had the control of the army taken away from it and given to the President, and the President and ministry were given the right to issue ordinances to meet emergencies. The words "mandatories of the people" as a description of the representatives, were eliminated from the constitution, and the age of eligibility for membership of the legislature was raised from 24 to 29, the *Bundesrat* became the *Länder- und Ständerat* and representatives of professions and trades were added to the representatives of the provinces. In this last change was presaged the much more fundamental revision of 1934, when the remnants of Professor Kelsen's constitution were swept aside and an avowedly corporative state set up in Austria. Austria's subsequent independent constitutional history was that of her federal executive. Whoever controlled the federal executive controlled Austria. Every motorist who has, in recent years, driven into Austria and received at the frontier a little blue and yellow map (changing almost every year) indicating which provinces (including one half of Salzburg) demanded that he should drive on the left, and which (including the other half of Salzburg) that he should drive on the right, has been presented with a picture of the type of provincialism that Professor Kelsen succeeded in propagating, and that neither the revision of 1929 nor the corporative state of 1934 managed to eradicate. But the tendency has long been for motorists (and others) in Austria to be required to keep more and more consistently to the right, and since March 1938. *Gleichschaltung* has made short work of what was still left.

CONSTITU-  
TIONAL  
REVISION  
OF 1929

CORPORATIVE  
AUSTRIAN  
CONSTITUTION  
OF 1934

"ANSCHLUSS",  
1938

Hungary, almost alone of the European states that suffered major territorial changes after 1918, retained her old constitutional system (after a short interlude as a

republic of soldiers and workers). The fundamental bases of the constitution were declared to be re-established in 1920, a regency was set up to fill the gap caused by the abdication of Charles Hapsburg as king of Hungary in 1918, and in 1921, when the Hapsburg succession was repudiated, the regency was continued indefinitely.

THE REGENCY  
IN HUNGARY

## PART VII

### LIBERTARIAN CONSTITUTIONS— THE EXPRESSIONIST STATE

## *Libertarian Constitutions — The Expressionist State*

*Those countries which in earlier centuries had given a lead to the world in the direction of establishing and safeguarding the liberty of the individual in the state, began to concentrate in the nineteenth century upon giving to the individual citizen the power to express himself and to make his own views felt in local and central government. This endeavour can be regarded as the positive side of the rights and liberties of the individual, for he might be fully protected against arbitrary arrest and imprisonment, he might have freedom of speech and religion, a free press and full right of petition, yet remain quite negative as an actual participant in the government of his country.*

*The sum of the individual citizens in the state, known as "the People", came to express themselves through what are known as democratic institutions, only around the middle of the nineteenth century, and even then their will to express themselves through regular and permanent constitutional forms received many set-backs. Only the universal manhood suffrage survived in France of all the gains of 1848 in this direction when the Second Republic gave way to the Second Empire. In Britain, despite the erection of political agitation into a fine art, capable of such successes as the passing of the first Reform Act and the repeal of the corn laws in the thirties and forties, the "Six Points" of the Chartists, which would have brought a very advanced form of popular expressionism into being in Britain, were all successfully resisted until the sixties and then only granted piecemeal. The United States of America had passed into the expressionist phase in the thirties of Andrew Jackson. In Europe Britain had to wait for her second and third Reform Acts and for much other legislation, France for the liberal empire and the Third Republic, and most other countries much longer, to reach a similar stage of development.*

## CHAPTER XX

### THE SECOND AND THIRD REPUBLICS IN FRANCE

EIGHTEEN forty-eight was the last of France's *bourgeois* revolutions. The preceding year, 1847, had seen the publication not only of Lamartine's *Histoire des Girondins*, which looked back to the first great revolution of 1789-95, but of Marx' and Engels' *Manifest der Kommunisten*, which looked forward to the Commune of 1871 and beyond. Standing as it does at the parting of the ways between the revolutionary idea which seeks only the capture and reform of the machinery of government, and that which seeks to destroy it utterly, between the striving for a readjustment of power between the different classes in the state and the resolve to replace the existing balance or lack of balance by a dictatorship of one class alone as a step toward a classless society, it is not surprising that the French Revolution of 1848 and the Second Republic have been variously inter-  
REVOLUTION  
OF 1848  
VARIOUSLY  
INTERPRETED  
preted, that Tocqueville, writing a preface for his new edition of *De la démocratie en*

*Amérique* in 1848, could interpret the movement along purely political lines and could participate in the affairs of the Second Republic as a moderate conservative, and that Karl Marx could get himself expelled from France by the government of this same Second Republic, and then proceed to describe the movement as "The Class-Struggle in France, 1848-50". It is obvious that when Tocqueville spoke of democracy in America and in France in his edition of 1848, and when Marx subtitled his *Neue Rheinische Zeitung*, in May 1848, "an Organ of Democracy", they meant by "Democracy" entirely different things. This confusion of terms as well as of aims has



always to be remembered in dealing with the revolution of 1848 and the Second Republic. It is a matter of emphasis whether one regards the history of the Second Republic as the beginning of a class-struggle the end of which is not yet discernible, or as the consummation of a struggle for Liberty, Equality and Fraternity commenced in 1789.

The reform banquets were primarily a protest against the constitutional and electoral "finality" of the *régime* of Louis Philippe and Guizot, and it was only to be expected that the provisional government of February 1848 should, as one of its first acts, proclaim universal manhood suffrage. Both the Girondins and the Jacobins had proclaimed it in their constitutions of 1793, without being able to put it into force, but in 1848 it was made use of for the first time in French history in the election of a sovereign constituent assembly. It was this assembly that organized the government, supervised the election of the President and framed the constitution of the Second Republic. It was also responsible for putting down the workers' rising of June 1848. Universal manhood suffrage, thus established, has never since been successfully assailed in France, but not all the things that the workers demanded in those June days have even yet been achieved.

The constitution of the Second Republic bears on its face the date November 4, 1848, and, indeed, it bears also the stamp of the fact that it was completed after the June days and after the episode of the national workshops. A specific and separate declaration of the rights and duties of the citizen was voted down in the constituent assembly, though a short "Preamble" was substituted for it, stating the general principles and aims of the constitution, and Chapter II of the constitution itself gives a list of rights guaranteed to the citizen. The "right to work" and to public assistance was denied

UNIVERSAL  
MANHOOD  
SUFFRAGE  
ESTABLISHED

CONSTITUTION  
OF THE  
SECOND  
REPUBLIC

a place in the constitution, and in its stead article 13 cautiously promised that public works should be promoted to give employment, and recognized the duty of the state to assist the orphaned, the aged and the infirm when their families could not help them. That is all. Scared by the demands of the working-class movement, the *bourgeois* constituent assembly reacted to the extent of falling short of article 21 of the declaration of rights of the Jacobin constitution of over a half a century earlier.

A single chamber legislature, to be renewed every three years, was set up. The executive power was given into the hands of a president, to be chosen by direct popular vote of the people, holding office for four years and not immediately re-eligible. The President was given wide powers modelled upon those of the President of the United States. He appointed and dismissed his own cabinet and possessed a suspensive veto on legislation, but could not dissolve or prorogue the legislature. A council of state, chosen for six years (and half renewed every three years) was to be elected by the legislature. It was to be presided over by the Vice-President (also chosen by the legislature from three candidates presented by the President). It was given somewhat indefinite powers, including the examination of and the giving of advice concerning proposed legislation, and thus occupied the position of a sort of *quasi* second chamber, as if the men of 1848 could not decide to have one and would not decide to have two. The separation of powers was insisted upon as the first requisite of a free government, but the relationship between legislature and executive was left vague. The question of the responsibility of the ministry to the legislature on which the possibility of setting up a parliamentary system of government as in Britain, or alternatively of following the practice of the United States, depended, was not settled in the constitution, and was to cause endless disputes

RELATIONSHIP  
BETWEEN  
LEGISLATURE  
AND  
EXECUTIVE  
LEFT VAGUE

between President and chamber during the short life of the Second Republic. In January 1851 a debate in the chamber showed it as favouring the responsibility of ministers.

The legislative chamber elected under the new universal suffrage in May 1849 proved to be unexpectedly conservative. The people had elected Louis Napoleon Bonaparte as first President of the Second Republic, but he and it were now confronted with a chamber that was in sentiment both anti-republican and anti-Bonapartist.

LEGISLATURE  
ATTACKS  
UNIVERSAL  
FRANCHISE,  
1850

The law of May 1850, seeking to limit the universal franchise by setting up a three-year residence qualification (instead of six months) for voters and imposing other regulations, which would have had the effect of disenfranchising about three million of the voters of 1848 and 1849, played straight into the hands of the Prince-President, who was seeking to discredit the legislature in the eyes of the country in order to be able to increase the authority of the executive, secure his own re-election in the teeth of the prohibition in the constitution of 1848 and thus pave the way for a restoration of the empire. The assembly's interference with the right of public meeting (out of fear of further socialist agitation) added to its unpopularity, and when the President rallied the country to him by demanding the restoration of the universal franchise, and then, by the *coup*

EXECUTIVE  
"COUP D'ÉTAT"  
OF 1851

*d'état* of December 1851, dissolved and dispersed the legislature, abrogated the electoral law of May 1850, and, after criticizing the constitution of 1848 and the attempt of the legislature to set up parliamentary government under it, demanded through a plebiscite the power to frame a new constitution, he received a popular vote of over ten to one (7,439,000 to 640,000) in his favour. Lord Palmerston was able quite genuinely, though somewhat untactfully, to rejoice at the success of a *coup d'état* which ended the

career of a reactionary assembly that had curtailed the liberties and restricted the franchise of the people of France. The *empire autoritaire* was after all, if already in the offing, still in the future, and even at its most repressive period it did not assail the universal franchise set up in 1848 and jeopardized in 1850-51. Britain had to wait until 1867 for her next "leap in the dark", and for another half century after that for complete manhood suffrage; Prussia remained a constitutional state after 1850 only by the postponement of the universal franchise for as long a period; Austria did not even remain a constitutional state. France, therefore, continued in one important constitutional feature, to lead the world (for a universal franchise was by no means general, even among the northern states of the American Union in 1850) despite the coming of a second Bonapartist dictatorship. It is, of course, arguable that the coincidence of universal manhood suffrage with the activities of the *empire autoritaire* in France, may have persuaded some European democrats that, standing alone, it was no adequate safeguard of the libertarian state, and driven them into wider fields of endeavour. The existence of a universal manhood suffrage (in which the Chartists, the reform banqueters, Frankfurt and Kremsier had placed so much faith) unaccompanied by adequate constitutional and social expression of the will and interests of the people as a whole, was grist to the Marx rather than to the Mill. There is a certain ironic significance in the realization that *Representative Government* and *Zur Kritik der politischen Oekonomie* (which may be described as *das Ur-Kapital*) were both written and published during the period of the *empire autoritaire*.

SECOND  
EMPIRE  
PRESERVES  
UNIVERSAL  
FRANCHISE

It took only one major military reverse (not two, as with the first empire) to bring down the Second Empire in 1870, and the chaos caused by the Prussian invasion and the siege of Paris very nearly brought down the

provisional *régime* (neither monarchy, empire, nor good red republic) that had carried on the war and conducted peace negotiations after the fall of Napoleon III. By the terms of the armistice with Prussia, a new French national assembly was to be elected forthwith in order that a properly constituted authority should exist to conclude

definitive peace. This assembly, elected on February 8, 1871, in accordance with the provisions of the franchise law of 1849 (with certain incompatibilities suppressed, thus making it the widest franchise ever yet seen in France) met at Bordeaux and proved to be a body of distinct conservative and monarchist leanings. Supporters of an Orleanist restoration formed the largest party ; Bonapartists were few ; Gambetta's republicans, who desired to carry on the war when the country as a whole desired peace, were not strongly represented. At the moment France had no constitution and the assembly was able to regard itself as sovereign, as the repository of all legal authority in the state. Leaving aside the question of a monarchical restoration for more urgent matters, its first action was to set up a separate executive power, with Adolphe Thiers at its head. He was not accorded the title of President and the whole arrangement was admittedly provisional. He exercised his powers under the authority of the assembly and remained a member of it.

The assembly's removal to Versailles did nothing to reconcile the people of Paris and their radical leaders toward this reactionary body, its ambiguous executive, its monarchist sympathies and its obsequiousness toward Prussia, and following the signing of the treaty of peace on March 11, the assembly and its government were repudiated in the capital by a revival of the revolutionary commune. This commune, elected on March 28, maintained precarious authority in Paris for two distracted months, until it

FRENCH  
NATIONAL  
ASSEMBLY  
OF 1871

THE PARIS  
COMMUNE  
OF 1871

was savagely crushed by force of arms by the troops under the command of the Versailles government, the Prussian army of occupation adopting an attitude of interested non-intervention. The commune of 1871 has received great subsequent publicity because two great revolutionary theorists, Marx and Lenin, have generalized from it principles of revolutionary behaviour which Lenin had the opportunity of putting into practice on a scale far more vast than that provided by the *arrondissements* of Paris in 1871, but in French history it remains an episode, and in French constitutional history it was not even that. The well-meaning but confused minds that directed the revolutionary commune of 1871 were responsible for many reforming decrees (abolition of the standing army, separation of church and state, reduction and regulation of hours of work, giving over the factories to the workers) which were neither worked out adequately nor possible to execute properly in the circumstances of the time, and they were driven in desperation toward the end to adopt more and more of the paraphernalia of the first French Revolution, such as a Committee of Public Safety and the Revolutionary Calendar, as magic totems to preserve them as the earlier revolutionary government had been preserved, and to allow their unconsciously Marxian ideals to recede into the background. The commune of 1871 was the last personal appearance of Jacobinism upon any stage, the *Götterdämmerung* of one revolutionary cycle subsequently rationalized into the *Rheingold* of another.

Until 1875 France remained without a constitution, and the gap left by the disappearance of the Second Empire was filled neither by a monarchy nor by a republic, though a *de facto* republic was actually in existence. The assembly elected in 1871 continued to act as a sovereign body, but the executive was reorganized and the office of President created, though Thiers quarrelled with the

NEITHER  
MONARCHY  
NOR REPUBLIC,  
1871-75

assembly and resigned from this office in 1873, to be succeeded by Marshal McMahon. McMahon was regarded by many as only keeping the place warm for a monarchical restoration, and by the law of November 20, 1873, he received the executive power for the long term of seven years, and wide authority. But the strength of the republicans was growing, and a turning point was reached in the deliberations of the assembly (which had turned itself into a constituent body upon somewhat ambiguous authority without any effective protest from the country) when the famous Wallon amendment, providing machinery for the re-election of the President or the choice of his successor by an absolute majority of a senate and chamber of deputies sitting together as a national assembly, was passed by 353 votes to 352. The acceptance of the possibility of the continuance for an indefinite period of the office of President, meant the legal acceptance of the existence of a republic in France, though this decision was reached by a majority of one vote only, and though no more precise declaration in favour of republican institutions was immediately forthcoming. The essential outlines of a new constitutional structure were then, with this crucial point passed, rapidly completed, the strong monarchist feeling still existing in the country being kept at bay by the chronic lack of cohesion between the different monarchist groups.

The constitutional system of the Third Republic is based on the three separate constitutional laws of 1875, and it lacks the clear-cut definition of earlier French constitutions because a body of institutions adaptable in the long run either to a monarchical or to a republican state was aimed at (despite the Wallon amendment) by a majority of the members of the assembly. Indeed, though the Third Republic has continued to consolidate itself for nearly two-thirds of a century, there is still a royalist movement (or rather, there are several royalist move-

ments) in France, and the letter of the present constitution would need to be very slightly modified (though its spirit would have to be fundamentally changed) were a monarchy once again set up, willing to be content with the position and power of the Presidency at the present day. Just as the existence of universal suffrage without liberty in France after 1851 began to make men doubt whether the universal franchise was worth, by itself, all the tributes that had been paid to it as a guarantee of democracy, so did the deliberate blurring of the dividing line between monarchical and republican institutions in France after 1870, begin to make them wonder whether it mattered very much which of the two existed in a constitutional state. Certainly, the republican tradition in Europe ceased for many decades to be a thing that men would die, fight or even stand up for. After the fall of the short-lived first Spanish republic in 1875 and the

WEAKNESS OF  
REPUBLICAN  
TRADITION  
ELSEWHERE

furtive establishment of the Third French Republic in the same year, Europe had to wait until 1910 (when the Portuguese monarchy disappeared) for the first success of a new wave of republicanism. The Third Republic was no very striking advertisement for the urgency of clear-cut republican institutions in a state that sought to give to its people the fullest possible means of expressing their will. A quite vigorous republican movement in Britain died down after the early seventies, and has hardly been heard of since. Monarchy versus Republic as an issue fell out of the unclenched hands of publicists and parties into the more eager clutches of debating societies, and has remained there (if anywhere) ever since. Only when the institutions of a country are subjected to fundamental modification for entirely different reasons, does the advisability of a change from the one to the other any longer arise. Otherwise (except in the remoter Balkans) the whole matter has become one of supreme indifference to all but a very few vested



interests. France, the republic that might easily have become a monarchy, Britain, the monarchy out of which, for its own purposes, a member-state of her Commonwealth may legislate the Crown without evoking effective protest, Hungary the nominal monarchy that has for twenty years remained *de facto* a republic, Italy which expands into an empire while the stature of its monarchy becomes ever more microscopic, Albania which changes from monarchy to republic and back into monarchy without the world (including many Albanians) noticing anything, and Greece, concerning which it is dangerous to be specific, and quite unprofitable — all these are contemporary examples of the doldrums into which a once noble controversy has fallen.

The law of February 25, 1875, on the Organization of Public Powers, that of February 24 on the Organization of the Senate and that of July 16 on Relations between the Public Powers, merely set up an executive and a legislative system and provided machinery for constitutional additions and revisions. Apart from the High Court of Justice (to act as which was one of the functions of the Senate, and whose functions were as much political as judicial) there was nothing on the judicial power, nor was there anything regarding the rights or duties of man or of the citizen. There was thus no single systematic and detailed constitutional text, but three *ad hoc* laws dealing with specific and limited matters. Yet this has proved to be the most durable of modern French constitutions, though providing only for the bare necessities of government and laying down no theoretical principles.

The legislative power was given into the hands of two houses, each with the power to initiate and to amend laws, and to reject proposals of the other house. The Chamber of Deputies was to be elected for four years by direct popular vote on a basis of universal manhood suffrage. The

FRENCH CON-  
STITUTIONAL  
LAWS OF 1875

THE  
LEGISLATIVE  
POWER

Senate, of 300 members, was to consist of 75 members elected for life by the existing constituent national assembly (with subsequent vacancies to be filled by the Senate itself) and 225 chosen indirectly for nine years by electoral colleges in the departments and colonies. Indirect election and choice by relatively small bodies was expected to produce an upper house that would counterbalance the directly and universally elected Chamber.

The executive was organized along the lines already drawn up in the law of 1873. The President was to hold office for seven years and to be elected by the Senate and Chamber sitting together as a national assembly. He was to be irremovable except for high treason, and was re-eligible. He was given wide powers in initiating legislation, he appointed state officials, was head of the army and navy, exercised the power of pardon, negotiated treaties, and nominated and dismissed members of the Council of State, but his powers were only to be exercised through ministers (over whose councils he presided) who were responsible to and who could be members of the legislature. Thus a "parliamentary", and not a "presidential" republic like the United States of America, was set up, with separation of functions but not (to any marked extent) of powers. The President could (with the consent of the Senate) dissolve the Chamber of Deputies; the Senate could sit as a High Court to judge persons accused by the Chamber; the constitutional laws could be revised or added to by separate absolute majorities in each house, ratified by an absolute majority in joint session as a national assembly.

THE  
EXECUTIVE  
POWER

Only two amendments to the constitutional laws have been found necessary (that of 1879 removing the seat of the government and the legislature from Versailles to Paris, and that of 1884 prohibiting the appointment of further life Senators, taking part of the law organizing

the Senate out of the "constitutional" category, and forbidding the bringing forward of any proposal to abolish the republican form of government), but many changes have been effected by ordinary laws, notably the various electoral laws, and the *régime* of the Third Republic today is very far from that envisaged by the half-hearted republicans and thwarted monarchists of 1875. Despite the absolutely equal powers given to the two houses in 1875 (apart from the provision that money bills should be originated in the Chamber) the lower house has tended to predominate. The Senate, even after the reforms of 1884, was still elected by only a few hundred people in each department, and, less securely grounded on general public approval, has used its great constitutional powers sparingly except on a few occasions. But it has often proved able, never more so than when dominated by a radical majority during recent years, to cause a government that could still command the support of the Chamber, to resign (Tardieu's in 1930, Laval's in 1932 and Blum's in 1937, for instance) and it has been asserted that its prestige has increased rather than diminished during the last two decades. The President has, on the other hand, receded very definitely into the background. Still nominally choosing a prime minister (or *président du conseil*), he is in practice bound to accept only one who can command a working majority in the legislature, or its temporary tolerance; still presiding over the council of ministers, he leaves its control in the hands of the prime minister and plays no active part in shaping policy; still possessing the power to delay legislation and to adjourn the Chamber, he hardly ever in practice does either; still able, with the concurrence of the Senate, to dissolve the Chamber of Deputies at any time, no President has done this for over half a century, and a constitutional crisis would probably result from any new attempt so to do. The term of four years

FORMAL AND  
INFORMAL  
CHANGES  
SINCE 1875

for the Chamber has become virtually as invariable as the two-year term of the American House of Representatives. The fact that dissolution of the Chamber would involve the suspension of the activities of the Senate as well, is no incentive to the latter body to co-operate with any President who might wish to secure a dissolution.

The elaborate system of standing committees or *bureaux* (eleven in the Chamber and nine in the Senate) that has grown up in the legislature during the present century, has tended to increase the vulnerability of the ministry in power, already subject to the wide challenge of the interpellation that may bring it down on a minor point, and liable to dismissal at the hands either of the Chamber or of the Senate. The powerful budget committee, in particular, can completely stultify the financial policy of a government. Though France has a parliamentary executive, its treatment at the hands of legislative committees resembles far more nearly that meted out to the non-parliamentary executive of the United States (whose continued existence is not affected by adverse committee recommendations or legislative votes) than that to which the British cabinet is subjected. Any French finance minister might envy the control over the passage of his budget into law that can be exercised by a British Chancellor of the Exchequer. Any British back-bencher might envy the control over government measures that his French counterpart can exercise in committee or by interpellation. Indeed, it has been said that government in France is carried on not by the ministers but by the chambers, a form of government "by mass meeting" that some deplore as producing acute ministerial instability, and others praise as the nearest approach to a true democracy in existence in the world today, for the composition of the ministry tends to change as the feeling of the legislature changes,

LEGISLATIVE  
STANDING  
COMMITTEES

"GOVERN-  
MENT BY THE  
CHAMBERS"

instead of the legislature, between elections, being as completely at the mercy of the cabinet as the people, under a representative system, tends to be at the mercy of the legislature. The group system in the French chambers is both a cause and an effect of this ministerial fluidity. French ministries may be regarded as normally in a state of suspense in their legislature. Any cooling of the legislature toward them and they are promptly precipitated. In Britain the ministry tends to remain crystallized for the whole duration of a Parliament.

The fixed point in the electoral system of the Third Republic has remained the universal manhood suffrage, but the method of voting has been varied considerably by successive electoral laws, only to return during the last decade to the original system set out in the organic electoral laws of 1875. This system was the *scrutin d'arrondissement* (the one member constituency) with provision for *scrutin de ballottage* (a second ballot between the two leading candidates should no one candidate obtain a majority of all votes cast in the first election). Between 1884 and 1889 this was replaced by the *scrutin de liste* (whereby each department formed a multi-member constituency and the voter was allowed to approve from a list of candidates as many as there were seats to be filled in the department) and the second ballot was eliminated. Though this was quickly abandoned in favour of the earlier arrangement, agitation continued in favour of some improved form of the *scrutin de liste*, and finally, in 1919, when constitutional devices everywhere were being overhauled, an elaborate compromise law was passed, introducing the large constituency once again, with proportional representation but with bonuses for the lists of majority parties. An "electoral quotient" had to be worked out in every constituency, and an "average" arrived at before seats could be apportioned. This too proved unsatisfactory, and none but

EXPERIMENT  
WITH METHODS  
OF VOTING

the mathematically minded will bemoan its abandonment in 1928, after alterations in 1924 had still failed to make it either more effective or easier to comprehend. For by-elections the old system of the second ballot had been retained, and since 1928 the *scrutin d'arrondissement* and *scrutin de ballottage* have come into their own again for general elections as well. A practice springing from the existence of the second ballot has been the tendency to form electoral *cartels* (the agreement in advance by a group of parties all to support the candidate of any of those parties up for second ballot against an outside candidate). This was used with considerable effect by the parties of the "popular front" in the elections of 1936, and certain sections of the right and centre have subsequently demanded fresh electoral reforms, involving the suppression once more of the second ballot.

The tendency on the part of recent French governments toward demanding "plenary powers" from the chambers, for the issuing of decree-laws aiming to ease domestic or international tension, and on the part of the chambers readily (on most occasions) to grant such powers, has made serious inroads into the immediate control of the legislature over the executive that was previously such a salient characteristic of the Government of the Third French Republic. This readiness of a virtually sovereign legislature to abdicate for the duration of any real or alleged period of emergency in national affairs has undoubtedly lowered its authority and its prestige in the country. It remains to be seen whether this prestige and authority can be recovered, or whether the corollary will be a permanent stiffening of executive authority in France, with a shift from the "parliamentary" to the "cabinet" type of government—or even further.

"PLENARY  
POWERS"

## CHAPTER XXI

### THE SUM OF A CENTURY OF INSTITUTIONAL REFORM IN BRITAIN

"THE great juggle of the English constitution. A thing of monopolies, churchcraft and sinecures, armorial hocus-pocus, primogeniture and pageantry." Such was the view of Richard Cobden in 1838. To what extent would the changes of the subsequent hundred years have served to mollify his scorn, could he have lived to observe them?

He was writing after the first Reform Act, after the great spate of legislation of the first reform administration, and after the accession of Queen Victoria, all of which proved to be the beginnings of trains of development that were considerably to alter the emphasis of the British constitutional system, but he was also writing in the

era of "Finality", in the shadow of an economic depression, in the midst of the Chartist agitation, and before Peel's administration of the forties and his own Anti-Corn Law League had swept aside what he regarded as the greatest anomalies of the situation in Great Britain. It was the age in Britain, as in France, of the admission of the lesser *bourgeoisie* to some share in political power. Indeed it has been said that local government in the towns was handed over to this one class by the Municipal Corporations Act of 1835. But in the national sphere its influence was as yet negligible beside the entrenched wealth and social prestige of the old governing class in Britain, or in the managed parliaments and bureaucratic oligarchy of Louis Philippe. British and French radicals were, in these days, prone to envy each other's countries, the former to regard 1830 and the latter to regard 1832 as

THE ERA OF  
"FINALITY"

the more promising advance, but for anything approaching a democratic *régime* they had both to look across the Atlantic to the United States of Andrew Jackson, though even there Charles Dickens was to provide an antidote to Tocqueville, and the blatancy of the newly perfected spoils system was to tend almost to reconcile Englishmen to the vagaries of the Circumlocution Office and Frenchmen to the "packing" of the Chamber.

By 1938 France and Britain, the one by fits and starts, wild rushes forward and sudden retrogressions, the other by a gradual, sometimes imperceptible, and entirely unexciting progression, had both again reached similar positions, constitutionally considered, though the institutions through which they worked differed considerably in detail. Nevertheless, it was possible for statesmen on both sides of the Channel to refer without ambiguity to their common interest in democratic forms, parliamentary government and the liberty of the individual (in a world that was seeming to turn away from all three) as reasons for their continued solidarity. Both had universal manhood suffrage and Britain allowed votes to women as well; both had a bicameral legislature in which the lower house tended to dominate, but in which the upper house remained not without influence on legislation and the fate of governments (though this became very much less in Britain after the Parliament Act of 1911). But the differences in detail were many. While "parliamentary" is a term that can generally be applied to the form of government in both countries, parliamentary government is rather differently interpreted. No French ministry is able, normally, to exercise that measure of control over the business and the decisions of parliament which its British equivalent usually possesses; in France the acts of civil servants in their official capacity and their dealings with the public are governed by separate administrative laws and are reviewed in special administrative courts,

BRITAIN  
AND FRANCE,  
1838-1938



instead of coming under the ordinary law of the land in the ordinary courts of the country ; the *bureaux* of the Chamber and Senate exercise a more powerful control over legislative proposals than do any of the more amorphous committees of the British Parliament ; the destructive force of the interpellation as a weapon of aggression against the ministry in France, is by no means matched by the means at the disposal of His Majesty's Opposition or of the dissatisfied private member for calling the government to account. The form of government existing in Great Britain today has indeed been characterized as "ministerial" because the ministry tends to dominate Parliament, and the term "parliamentary" has sometimes been reserved for the form where, as in France, the parliament tends to dominate the ministry. The fall of a ministry (when it involves more than a mere cabinet reshuffle) still remains a major crisis in British political life ; in France it need be nothing of the sort. In Britain it is nearly always, but in France it is hardly ever followed by a general election. The term of a British Parliament is now in practice never as long as the five year legislative term, but corresponds to a ministerial term. It ends when a ministry goes out of office, or else when the ministry in power judges the moment most propitious for it to secure a fresh mandate. To wait the full term of five years would be playing into the hands of the opposition by depriving the government of the advantage of the element of surprise and of choosing the best tactical moment. In the twenty years between 1918 and 1938 Britain had seven general elections, but France, though the legal term of a legislature is one year shorter, had only five.

The very area to which the British constitution was applicable was different in 1938 from what it had been in 1838, for Ireland, whose parliament had been suppressed in 1801, climaxed the long and bitter home rule agitation

"PARLIAM-  
ENTARY" AND  
"MINIS-  
TERIAL"  
GOVERNMENT

by a compromise which, in 1921, gave her two separate parliaments, and a partition of her soil which maintained the close connection of six of her northern counties with Great Britain but gave the remainder, as the Irish Free State, the virtually independent status of Canada, a status recently altered to *de facto* independence (though the *de jure* position created by the legislation of December 11 and 12, 1936, by the adoption of the new constitution of Eire in December 1937 and by the Anglo-Irish agreement of 1938 remains equivocal). Despite the existence of nationalist movements in both Scotland and Wales, neither of these countries possessed in 1938 the autonomous position and separate parliament (which did not involve loss of concurrent representation at Westminster) of the one million inhabitants of the six counties of Northern Ireland. This arrangement called by one critic "a form of home rule that the Devil himself could never have imagined" and by another "a Stormont in a teacup", has been uneasily but tenaciously maintained, with the aid of the repressive Civil Authorities Act of 1922 (which was continued year by year until 1933 and then made a permanent piece of legislation) in the teeth of all opposition, both within and without the six counties.

In 1938 the British parliamentary franchise had, for a decade, been universal for both men and women at the age of 21, subject only to a residential qualification for inclusion on the register of electors. Legislation accompanying the various extensions of the franchise had produced throughout the country, constituencies roughly equal in population, with the exception of the relatively few two-member borough and university constituencies. The secret ballot had been in use since 1872 and the voting in a general election was all on one day throughout the country (with the exception of the university vote), and

AUTONOMY  
AND PARTITION  
IN IRELAND

ELECTIONS  
AND THE  
HOUSE OF  
COMMONS

no elector could cast more than two votes (or one in any particular constituency), but no device such as the second ballot or any form of proportional representation (except the latter in the two-member university constituencies) had been adopted, despite much dissatisfaction in some quarters because of the frequent election of candidates who secured only minorities of the total votes cast in their constituencies when there were more than two candidates, and at the occasional control obtained over a majority of the seats in the House of Commons by political parties securing only a minority of the popular vote in the country as a whole. Membership of the House of Commons was open virtually to all men and women over the age of 21 in the country (indeed, between 1918 and 1928, women could be members at 21 but could only vote at 30 !) without property qualification or religious test, and both salaries and travelling expenses were paid to them, but as yet only a handful of women had succeeded in becoming members of any Parliament, while a large proportion of the male members continued to be drawn from the economically prosperous and socially prominent classes, though certain professional groups (such as the rising lawyers, the retired civil servants and the trade union officials) tended to enter Parliament in appreciable numbers.

The House of Lords has a large and unwieldy membership and is still made up in the main (in 1838 this had only very recently become the case) of hereditary peers, but its business is rarely conducted by more than about ten per cent of its full membership. A century ago it had already long since lost the right to initiate financial legislation, but its power to amend or to reject it, though rarely exercised, had not been expressly denied. The episode of the repeal of the paper duties in 1860-61 checked the power of the House of Lords to amend, and the Parliamentary Act of 1911 took away its power to

HOUSE OF  
LORDS AND  
THE PARLIA-  
MENT ACT

reject money bills. Its power to reject ordinary legislation had been shown by the struggle over the Reform Act of 1832 to be subject to practical limitations, but this power continued to be exercised, and was not legally impaired until the Parliament Act of 1911 reduced it to a mere suspensive veto. Since 1914 there has never been a difference of opinion between the House of Commons and the House of Lords regarding the merits of any piece of legislation, that has persisted long enough, without one house or the other giving way, for any bill to have needed to become law without the consent of the House of Lords, but the existence on the statute book of the act of 1911 has not been without effect upon the votes and abstentions of their lordships. None of the many proposals for the reform or abolition of the House of Lords had come to anything by 1938. The House had itself successfully withstood the attempt to institute life peerages, though it had permitted the creation of a limited number of *ex officio* law lords. Apart from the exceptions of these law lords and of the senior bishops of the Church of England, the hereditary principle remains the exclusive basis of membership. In contrast to the appellate function of the House of Lords acting (through its members with the requisite legal qualifications) as a court of law, which has tended to increase rather than to diminish in importance, the criminal trial of a member of the House by his peers remained an embarrassing archaism until the procedure was abolished in 1937.

With the enormous growth in the sphere of the activities of the central government, which began with the new legislative preoccupation of the first reformed Parliament but which became far greater when what Dicey has called collectivism replaced utilitarianism as the mainspring of such activity around the eighteen seventies, and greater still in the twentieth century when the continental and overseas lead in national insurance and pension schemes was followed

GROWTH OF  
MINISTERIAL  
ACTIVITIES

in Great Britain. The size of the ministry (like that of the civil service) increased considerably. Beside old offices like Lord Privy Seal, Lord President of the Council, Chancellor of the Exchequer, and the Secretaries of State (increased from two to five during Cobden's lifetime, and subsequently to as many as nine—itself a reflection at the increasing need for division of labour in government), many new ones such as Minister of Education and Minister of Health have been created since his time, and a number of minor departments, such as those of Mines and Pensions, have come into existence, while the Post Office, modernized only from 1840 onward, has become not only the greatest business enterprise of the state, but latterly a near approach (with its interest in radio broadcasting and cinema films) to a "Ministry of Propaganda" such as exists in an increasing number of other countries. All this has meant the existence of a ministry far too unwieldy for the efficient control, as one body, of policy. The cabinet, itself swollen in size, "no longer very small or very secret", has not only fulfilled this function for the many departments not directly represented among its members, but has also become the body which really legislates. It has been pointed out that the cabinet (and indeed, a few members only of the cabinet) frames the annual financial budget and that the House of Commons has in practice scarcely more control over a money bill than has the House of Lords. It is allowed to debate the budget, but the government is in a position to get any proposed amendment rejected, and rejection of the whole of any financial measure by the House is unthinkable. Even the cabinet has tended to become unwieldy, and the ancient device of the "inner cabinet" of specially important ministers of state has remained as potent and as informal as ever, though during the war of 1914–18 an organization known as "The War Council" of five (augmented temporarily from time to

CABINET  
REALLY  
LEGISLATES

time by the presence of visiting dominion prime ministers) came officially into being. The Prime Minister (unrecognized officially as a separate officer of state until 1905) has tended to become more and more a "chief executive" comparable in some ways to the President of the United States, using the other ministers (who are, of course, personally selected by him) as his mouthpieces. The tendency for parliamentary questions upon almost every subject to be addressed in the House of Commons direct to the Prime Minister whenever important principles of policy are involved, leaving only routine and detailed points for the appropriate departmental heads, is perhaps due to a realization that he has acquired in the ministry and in the cabinet a paramount position that earlier Prime Ministers, from the younger Pitt onward, have occasionally occupied by sheer force of character, but which does not seem until the twentieth century to have been recognized as an essential characteristic of the office. Electors are now asked to trust the Prime Minister to pursue whatever policies he shall think fit, rather than to approve in advance some definite programme with which he has gone to the country. They, and Parliament as well, are required to listen to his confessions of faith, hope, despair, subterfuge, error and perplexity, but he has reached a semi-mystical position in the constitutional system that makes him able to demand and to secure from them a blank cheque such as Pitt would have failed to recognize, Peel would have refrained from using, Palmerston would have laughed at, Gladstone would have torn to pieces and Disraeli would have held up to the light. From the Divine Right of Kings, three hundred years of constitutional development and controversy has brought Great Britain to something that seems to have features of the Divine Right of Prime Ministers. Since 1922, when Lord Curzon was passed over in favour of Mr. Baldwin, it has been recognized that membership of

PRIME  
MINISTER  
AS "CHIEF  
EXECUTIVE"

the House of Lords is not compatible with the premier-ship. It has yet to be established that any other cabinet office (with the exception of that of Chancellor of the Exchequer, where there has always been a practical bar ever since the Treasury went into commission) carries a similar incompatibility. Indeed, the Ministerial Salaries Act of 1937, by limiting the number of ministers and under-secretaries receiving the salaries specified, that may sit and vote in the House of Commons, seems calculated to preserve for members of the House of Lords an appreciable number of important ministerial positions in future governments.

The British civil service, at which the generation of the reform age so justifiably pointed with scorn as in no way comparable to the efficient bureaucracies of one or two continental countries, has, in a century, changed beyond recognition. The few hundred clerks of 1838, haphazardly recruited on a basis of patronage, had changed into a third of a million officials, chosen almost exclusively on a merit system and after careful examination. The merit system, introduced first into the Indian civil service, when the state took over from the East India Company in the eighteen fifties, spread within two decades to the home civil service, and has now completely conquered every citadel except the ivory tower of the diplomatic *corps*, and even there, though nomination survives, the nominees are put through the examination filter.

The permanent and administrative side of the executive arm which is the civil service (including the police force), the formal and symbolic side which is the crown, and the political and parliamentary side which is the ministry, are linked together by the cabinet, whose members are at one and the same time the heads of government departments in Whitehall, the leaders of the party in power in the Houses of Parliament, and Privy Councillors

CIVIL SERVICE  
BY MERIT AND  
EXAMINATION

CABINET  
GIVES UNITY  
TO GOVERN-  
MENTAL  
SYSTEM

advising the king at Buckingham Palace. A cabinet minister may have to divide himself into three parts in the course of his duties, but this division of functions paradoxically has to serve to keep the machinery of state working together, or if it does not, so much the worse, for he is the only common denominator in the system. Such a system, of course, has its dangers, and the two constitutional principles of the sovereignty of Parliament and the rule of law which were definitely established during the century following the revolution of 1688, and given new significance by the legislative activity of the nineteenth century, had reached their apogee when Dicey defined and discussed them with crystal clarity in the eighteen eighties. At that time Parliament stood at the pinnacle of its prestige, and even Prime Ministers trembled before it. As a law-making body it had, in the space of half a century, transformed the country. Parliament had done so much in so short a time that it was perfectly natural to insist upon the axiom that there was nothing that Parliament could not do (except, of course, to order the extermination of all blue-eyed babies, as Dicey, with heavy humour, pointed out), and British liberties appeared so secure behind the inflexible armour of the rule of law that Dicey's praise of certain foreign ways of doing things seemed almost to be irrelevant. But a quarter of a century later Dicey himself was beginning to doubt whether the rule of law was being fully maintained, though he stoutly denied that the sovereignty of Parliament, as he had defined it, had been impaired, and after the lapse of a further quarter century another prominent lawyer was discussing what he called "The New Despotism" and the Lord Chancellor of the day (1929) was setting up a committee to report on the safeguards necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law. This committee had to consider the powers

SOVEREIGNTY  
OF PARLIA-  
MENT AND  
RULE OF LAW



exercised by and under the direction of (or by persons or bodies appointed specially by) ministers of the crown, by way of delegated legislation and of judicial or quasi-judicial decision.

Both these enquiries were based upon the assumption that Dicey's famous analysis of the British constitution had been a sound one, and that a careful adherence to the principles of the sovereignty of Parliament and the rule of law was still advisable, but from other quarters came the suggestion that, even if they were valid when Dicey wrote, these principles were now antiquated and hardly suited to the needs of the British state. It was argued

THESE  
PRINCIPLES  
ATTACKED AS  
ANTIQUATED

that the complexity of modern government made delegated legislation absolutely essential to an ever-increasing extent in all civilized countries; that acts of Parliament could no longer foresee every eventuality, and must perforce give ministers discretion to amplify, modify or even to ignore certain of their clauses. It was also argued that a similar pressure had caused officials to assume judicial or quasi-judicial functions under the direction of departmental heads, and that though this "trial by Whitehall" was not legally trial at all and was actually a denial of the rule of law, the remedy was not simply to cut off its head and return to the Dicey-pure principle, but to recognize that these bureaucratic judicial powers must be regularized by the adoption of some form of *droit administratif*, for the evil was not the existence of administrative tribunals, but to have the courts without the law. Even Dicey himself, while asserting that the basic principles of the British constitution in the year 1884 were the sovereignty of Parliament and the rule of law, had suggested the advisability of making use of delegated legislation, and had pointed to the merits of a system of administrative law, but his plea for a systematic treatment of future needs in these directions was ignored.

While the growth of administrative tribunals without

any systematization under a code of administrative law might have alarmed Cobden as much as it did Dicey and Hewart, he would probably have expressed gratification at the reorganization of the ordinary courts of law that has been carried out in Britain since his day. He himself saw the beginnings in the creation of the Judicial Committee of the Privy Council in 1833, of the County Courts in 1846 and of the new Probate, Divorce and Admiralty Courts, but the reforms of 1873-94 and subsequent changes, produced a thoroughgoing and much needed simplification by completing the fusion of law and equity, drawing the line carefully between central and local courts, as well as between civil courts and criminal courts, and rounding off the system of courts of appeal. He might have been less complacent about the disappearance of one ancient legal institution, the grand jury, or jury of presentment, in the twentieth century.

REORGANIZA-  
TION OF  
JUDICIAL  
SYSTEM

Cobden saw also the beginnings but not the completion of the reorganization of British local government institutions. The Poor Law Amendment Act of 1834 had set up the Union, an administrative unit intermediate between the shire and the parish and had applied the principle of election in the choice of the new local guardians of the poor, while the Municipal Corporations Act of 1835 had extended the principle of election by all ratepayers to the government of all the boroughs of the country (with the exception of the City of London and Winchelsea). The Public Health Acts of 1848 and 1872 created local government districts and rural and urban district councils for areas outside municipal boundaries, but not until the County Councils Act of 1888 and the District and Parish Councils Act of 1894 was the new democratically elected hierarchy of local government bodies in administrative counties and county boroughs, in urban and rural districts and in civil parishes, completed, and virtually all the *ad hoc*

REORGANIZA-  
TION OF LOCAL  
GOVERNMENT

bodies (that had been created for special purposes in the era of transition) liquidated. The Local Government (De-Rating) Act of 1929 completed the absorption of the *ad hoc* authorities into the regular local government system, by abolishing the one remaining type, the boards of guardians of the poor created in 1834, and replacing them by public assistance committees of the local councils. With the reorganization of local government a new class of expert came into existence, the paid local government official, devoting his whole time to work that had previously fallen by rotation upon citizens as a whole, and making possible the efficient working of the policies laid down by the elected local councils, whose members were unpaid and rarely able to devote more than a part of their time to local government. The central government, which had abandoned so much of the initiative in and control over local affairs in the seventeenth and eighteenth centuries, was able to ensure that, having created a new and uniform system, it could keep it uniform, notably by the power to make or withhold grants for local purposes, and by its inspectorate to supervise local government activities.

In 1938 Great Britain remained a monarchy. Cobden lived to see the British monarchy once more a popular institution after a sorry fall in its prestige at the hands of the sons of George III, but he did not see it go once more under a cloud in the late eighteen sixties and early seventies (when Bagehot could write of "a retired widow and an unemployed youth" and a vigorous republican movement could briefly flourish) nor rise to new heights as an imperial symbol after 1877. The coronation ceremony of 1937 would have presented familiar features, but the abdication crisis of 1936 would have been beyond his experience or imagination.

VICISSITUDES  
OF THE  
MONARCHY

## CHAPTER XXII

### EXPANSION OF WESTERN CONSTITUTIONALISM— LIBERTARIAN INSTITUTIONS IN TRANSLATION

THE expressionist state was developed by gradual processes, and upon a basis of existing institutions, in the United States of America, France, Britain, Switzerland, the two Netherland and the LIBERTARIAN  
GOVERNMENT  
IN EUROPE three Scandinavian countries, to a degree that made it, by the end of the nineteenth century, the most envied form of political organization in the world, but in no other sovereign state had it, by that date, achieved conspicuous success. In Latin America the Brazilian empire, which had contained germs of a libertarian *régime*, disappeared in the eighteen eighties, and of the republics only Chile seemed capable of a sustained effort in the direction of parliamentary government as understood in libertarian countries. In Europe the short-lived first Spanish republic of 1873, which also might have developed in this direction, expired after a few months, and the trend was arrested (as it had been previously in 1814, 1823 and 1846 and was to be yet again in 1936), while the inflated Piedmontese *Statuto* in united Italy gave only a libertarian veneer, and neither in member-state nor in *Reich* did united Germany or disunited Austria-Hungary embrace the libertarian form or even acknowledge it to be desirable.

Outside Europe and the independent states of the Americas, the most highly developed forms of government, until quite late in the nineteenth century, were the more subtle kinds of oriental despotism, such as were practised by the Manchu dynasty in China, the Tokugawa Shogunate in Japan and by certain of the "protected" princes of

India, Malaya and the East Indies. The new era of the expansion of European interest in these parts of the world, and the revival of imperialism that it engendered, were pioneered by the leading libertarian states, and one by one the oriental despotisms found themselves losing face in contact with these states, either by having to submit to the loss or drastic curtailment of their independence, or else by having to make humiliating concessions in the form of trading privileges and extra-territorial rights. It was only natural that this libertarian form of government, which appeared to make its exponents so irresistible against oriental rulers and peoples (or even against semi-oriental ones like those of Turkey and Russia), should have presented itself as worthy of study, and possibly of emulation, by those who had been bruised in contact with it. This type of government appeared to go hand in hand with the highly developed economic organization and industrial development of the conquerors, but while the latter could only be copied by slow and painful processes, the former could be made use of, it was thought, simply by producing libertarian constitutions in translation.

Though there was much freedom in the translation, this freedom did not always extend to the form of government set up, any more than it had done when the new republics of Latin America had translated the United States constitution into Spanish and Portuguese for themselves. This applied as much when the libertarian form was translated for the use of dependencies of the libertarian states themselves as when it was adapted by independent states. The libertarian states have been most grudging with their free institutions except to dependencies situated at great distances from the mother-country, in temperate lands, and populated by people of their own or similar racial stock. These obtained a large and increasing

"EXPANSION  
OF EUROPE"  
WIDENS ITS  
APPEAL

DIFFICULTIES  
IN  
TRANSLATION

measure of home rule, but dependencies in temperate lands, near or adjacent to the mother-country, tended for strategic and other reasons to be kept on a much shorter string. The best they could hope for was to be ruled as integral parts of the states under whose sovereignty they had fallen, but more often they were ruled as provinces with less liberty, either of the subject or of self-expression as communities, than was possessed by the peoples of the dominating states. The British policy toward Ireland and the French toward North Africa are cases to point, and though libertarian institutions did not exist in the Hapsburg monarchy, provinces such as Bosnia were far more remote from them than were the two dominating partners in the *Ausgleich*. Tropical or sub-tropical dependencies not too far distant from the mother-country could sometimes be treated integrally, but when far away they tended to be subjected to strict military control for the protection of the ruling minority and of its interests. Empty and undeveloped lands had first to be populated from the home country, and these tended to copy the form of government at home with certain variations, if they were allowed to do so, but dependencies with large existing populations and established dynasties, either continued with their old institutions after the old rulers had been made vassals of the dominating state, or else the rulers were deposed and they were placed under imposed bureaucratic systems run by imported administrators. The greatest difficulty in the early stages of the imperial revival was experienced with tropical dependencies containing large uncivilized or semi-civilized peoples (such as the Belgian Congo), but later on a greater problem arose in connection with dependencies (such as India) which contained large populations with pre-existing, perhaps ancient, civilizations of their own, upon which the culture and institutions of the ruling state had, it was thought, to be grafted.

Britain, France, the United States of America, Bel-

gium and Holland, all belonging to the libertarian circle, emerged as the leading colonial powers of the imperial revival. Germany and Portugal, neither of which could have been called a libertarian state at the end of the nineteenth century, were then the only other colonial powers of consequence, but Germany's was but a skeleton of a colonial empire, and was soon to disappear (to become a skeleton in the cupboard for the rest of the colonial powers) and Portugal's was but a remnant of her spoils of the first great modern era of European discovery and expansion overseas.

France, Belgium, Holland, Germany and Portugal refrained from giving the libertarian principle its head in any of their colonies. Though the policy of "association" replaced that of "assimilation" in France's attitude toward her colonies, and their limited but direct representation in the French Senate and Chamber of Deputies made the central legislature of the republic a truly "imperial" parliament such as the British Parliament had never been, her colonial system allows for no fully self-governing colonies, though partial self-government has in places been granted. The Dutch East Indies, or Netherlands India, and the lesser Dutch colonies, have been treated to even fewer gestures in the direction of self-government, and the Belgian Congo, rescued from the untrammelled clutches of Leopold II by the cession of the cynically named "Congo Free State" in 1907 and by the colonial law (which placed it under the control of the Belgian parliament), has continued to be ruled on the "plantation" basis. The German colonies lost in 1919 had been administered by skilled administrators entirely under the control of the home government. Portugal deposed her ruling dynasty and became a republic in 1910 without her "old colonial system" being appreciably affected. The same may be said of the effect of her law of

LIBERTARIAN  
COLONIAL  
POWERS AND  
OTHERS

FRANCE,  
HOLLAND,  
BELGIUM,  
GERMANY AND  
PORTUGAL

1920 and her decree of 1930, each of which re-wrote section V (colonial administration) of the constitution of 1911.

Though Britain has continued to keep many, and the United States a few colonial territories, in a purely dependent state, the problems for these two countries were more complex and the governmental solutions devised more varied.

BRITAIN AND  
THE U.S.A.

Britain's crown colonies of various sorts (but all under governors directly responsible only to the home government) stand at one end of the scale, and Canada, Australia, New Zealand, South Africa and Eire (all for most practical purposes independent nations with individual constitutional systems, which receive separate notice elsewhere), at the other, but intermediate between these, several small territories (such as Ceylon, Cyprus and Burma and the "lost dominion" of Newfoundland) and one very large one (India), stand in a more ambiguous position.

Nowhere in the world has the libertarian tradition had such a struggle with its conscience as in British India during the last hundred years; nowhere else have British institutions been translated into such startling Baboo; nowhere else has so little substance of self-government cast so many shadows of constitutional forms. After two centuries and a half of administration by the East India Company of a territory constantly growing in size and complexity, British India came under the exclusive control of the British government in 1858, the government having participated in its supervision and in the completion of a centralized administration since the reorganization resulting from the legislation of the last quarter of the eighteenth century. The policy of centralization and strict administrative control by British officials was continued (being underlined by the creation of the "Indian Empire" in 1876) into the twentieth century, and while the principles of the libertarian state became familiar to an ever-increasing number of Indians, with the spread of

BRITISH INDIA



western education in their country, these principles found little place in the government of India before 1919, and a place still quite unacceptable to advanced Indian opinion under the system of "dyarchy" set up by the Government of India Act passed by the British Parliament in that year. The pressure of war conditions, just as it had prompted Parliament to grant a measure of female suffrage at home and further to democratize the system of representation generally, also produced the declaration of August 20, 1917, which promised "the gradual development of self-governing institutions with a view to the progressive realization of responsible government in British India". The Chelmsford-Montague report, which followed upon this declaration, introduced into Indian constitutional history the system of dyarchy that was the salient feature of the act of 1919. Under it certain of the local governments in the provinces which, up to that time, had merely acted as agents of the central government of India, had specified powers transferred to them, and ministers responsible to elected provincial assemblies were to exercise these "transferred" powers. The remaining, or "reserved", powers still lay directly in the hands of the central government of India, which was now given a bicameral legislature consisting of a legislative assembly (a majority of whose members were to be elected) and a council of state (with a nominated majority). Only three per cent of the population of India was eligible under the rigorous suffrage qualifications to take part in the provincial elections, and the provincial governors could override the elected ministers even with regard to the exercise of the transferred powers, while with regard to the reserved powers (herein lay the essence of dyarchy) they acted, under the Governor General, without any reference whatever to the provincial legislatures or ministers. In essence this still left India with a unitary form of government (for the transferred powers

POLICY OF  
DYARCHY,  
1919

were only tentatively handed over) rigidly prescribed by the British Parliament, and incapable of amendment except at Westminster.

The ten years period of experiment with this pale and distorted reflection of certain elements of the libertarian state, left both India and Britain only too willing to abandon it. The Simon commission reported in 1930, the British government defined its attitude toward the recommendations of the commission as substantial acceptance in a White Paper issued in 1933 after a series of "Round Table Conferences" with Indian rulers and leaders of opinion, and a new Government of India Act went on to the statute book in 1935 after a stormy and difficult passage. The slowness of this procedure meant that the constitutional arrangements of 1919 (themselves not fully put into operation until 1921) were continued for almost a decade beyond the ten year experimental period. The most important parts of the act of 1935 did not come into effect until April 1, 1937. The commission had recommended, and the act embodied the abandonment both of the experiment of dyarchy and of the traditional policy of strictly centralized government. A federal system was to be set up in British India and extended, with their consent, to the territories of the native princes, while Burma was to be completely separated from India. The provincial electorate in British India was to be increased to at least ten per cent of the total population and to contain an appreciably larger proportion of women. Provincial autonomy of a far reaching sort was to be set up, with governments responsible to the elected legislatures (which might be either unicameral or bicameral), but the provincial Governor had the right either to veto legislation or to refer it to the Governor General at Delhi, under whose direction he still remained. This safeguard, considered essential both by the Simon commission and by Parlia-

SIMON COM-  
MISSION AND  
ACT OF 1935

FEDERAL  
SYSTEM TO  
BE SET UP

ment, was much criticized in India as a continued deviation from the libertarian principle, and friction in the working of the new system has already resulted from it. Nevertheless, the Simon commission report represents a far franker treatment of the problems connected with translating the libertarian principle to regions with quite different traditions, than any previous British approach to the momentous problem of the government of India. As striking as Macaulay's famous recommendations regarding educational policy in India, and far more comprehensive in its understanding of the problems involved, the Simon report discusses the applicability of

APPLICABILITY  
OF BRITISH  
INSTITUTIONS  
QUESTIONED

the British model to India's constitutional needs and capabilities. "British Parliamentaryism in India is a translation" it points out, "and in even the best translation the essential meaning is apt to be lost. . . . It does not follow that it will suit everybody. . . . In England, it results in stable government largely because of the extent to which the Cabinet controls the House of Commons, instead of the House of Commons controlling the Cabinet. . . . We consider that the precedent for the Central Government in India must be sought for elsewhere." For this reason a unitary solution with a central Indian legislature in any way resembling the British Parliament in organization or structure should be abandoned in favour of the ideal of an All-India federation. A federated India could not immediately be brought into being because prerequisites were the existence among the members of the federation of a degree of autonomy such as the provinces of British India did not as yet possess and a measure of willingness to federate such as a number of the native rulers did not as yet exhibit, but nevertheless "the ultimate Constitution of India must be federal".

India is thus just entering upon another experiment with libertarian trends, and though many of the old

safeguards have been inserted into the new constitution by the British government and Parliament, this new translation seems to be nearer to a realization of the inadequacy of mechanical and arbitrary solutions to the problem of India's government, either by her own people or by anyone else, than any previous effort. Better hopes for the future lie in the recognition as a first principle by the Simon commission and by a majority of Parliament that "the new Constitution should, as far as possible, contain within itself provision for its own development", so that India may be freed from having to go hat in hand to Westminster every decade or so for a fresh Government of India Act, and in the admission that India is more likely to find useful precedents in building up an appropriate libertarian form of government and expressionist state in the other federated nations of the British Commonwealth and in the United States of America than in the unitary and highly individualized system of Great Britain, for "To imagine that a constitutional structure suitable for 45,000,000 of British people, mainly urban, will serve equally well for 250,000,000 of Indians spread over a sub-continent and living in half a million villages, is unreasonable".

The embarrassment of a people that had developed its own institutions along libertarian lines, when confronted with the problem of governing distant dependencies inhabited by considerable alien populations of different civilizations from their own, was also felt by the United States of America when she acquired, toward the end of the nineteenth century, an island empire mainly at the expense of Spain. The process of preparation of a newly acquired or developed region for statehood as an equal member of the American union, which she had applied with such conspicuous success to her continental territories throughout the nineteenth century, was not accepted

OTHER  
PRECEDENTS  
MORE  
APPOSITE

ISLAND  
EMPIRE OF  
THE U.S.A.

as suitable for the Sandwich Islands, or Cuba, or Puerto Rico, or the Philippines. The first of these early reached the stage of an organized territory and its inhabitants received American citizenship, and as such it has remained, but the Foraker Act of Congress (passed in 1900 and sustained by the Supreme Court in 1901) excluded the inhabitants of the others from American citizenship and declared that they were not to be treated as part of the United States ; her laws were not automatically to apply to them and they remained outside her tariff wall. There was no intention of admitting them to the union. They were to be kept as dependencies, and their civil status and the political rights of their inhabitants were to be regulated by Congress. Cuba was almost from the first treated as a protectorate rather than as a possession, and after a period of strict control by the United States (exercised through both military and economic channels) she has tended to drift into the governmental ways of the typical Latin American republic. Britain's protectorate over Egypt presented some parallels to that of the United States over Cuba. Puerto Rico is the dependency about which the United States has most conspicuously failed to make up her mind. Although it has been organized as a territory and its inhabitants have been given American citizenship (as those of Cuba and the Philippines were not), which is the first step in the direction of statehood and membership of the union, nothing further has developed along this line since the Jones Act of 1917, and a native demand for independence is pulling in another direction.

While the United States has applied a feature of her well-tested governmental system to Hawaii and Puerto Rico by organizing them as territories with representative institutions and delegates at Washington, and with governors appointed by the President with the approval of the Senate, and has discreetly turned her back upon the form of government practised in the republic of Cuba,

THE FORAKER  
ACT, 1900

she has been forced to face problems far more complex in her most distant and most populous island dependency of the Philippines. Here, as in India, an oriental people has been placed under the influence of a western people possessing libertarian traditions, and through gradual though rather less grudging concessions has come within reach of independent self-expression through libertarian constitutional forms.

PROBLEM  
OF THE  
PHILIPPINES

The Philippines were only ruled without any native participation for the first ten years of United States sovereignty over the islands. In 1907 a native assembly elected on a limited franchise was created, and as upper house a mixed commission of American and Filipino members (the latter in a majority after 1913) was appointed by the President of the United States. The Jones Act of 1917, declaring that "It has always been the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable form of government can be established therein", abolished the commission and created in its place a Senate, all but a very few of whose members were elected by the separate provinces of the Islands. The assembly was reorganized and renamed the House of Representatives, and the franchise qualifications were materially lowered. The powers of the Governor General were retained, but in 1918 a Council of State was set up, consisting of the Governor General, the six heads of the major executive departments and the presiding officers of both legislative houses. All of these councillors of state, with the exception of the Governor General himself, could be Filipinos, and the civil service was also by that time predominantly Filipino in personnel. Progress toward the reality of a libertarian Philippine government was thus positive though (despite an active and persistent independence movement) unhurried.

THE JONES  
ACT, 1917

The decision ultimately to recognize the independence of the Philippines having been taken (a decision such as no British government has as yet reached with regard to India) the United States brought the period of tutelage to its penultimate state when Congress passed the Tydings-McDuffie Act "to enable the people of the Philippine Islands to adopt a constitution and form of government for the Philippine Islands to provide for the independence

THE TYDINGS-  
MCDUFFIE  
ACT, 1934

of same " in 1933, and the President signed the act in 1934. This " Philippine Charter of Liberty ", as it was called by enthusiastic

Filipinos, provided that a native constituent convention should forthwith frame a constitution for the islands ; it must establish a republican form of government, embody a bill of rights, and provide for transitional arrangements pending the withdrawal of United States sovereignty, but in other directions the conventions was not bound in advance ; when completed the constitution must first receive the approval of the President of the United States, and then of a majority of the Filipino people in a referendum, before going into force. Before the end of 1935 all these processes had been completed, and the final date of the recognition of Philippine independence and the withdrawal of American sovereignty was fixed as July 4, 1946. The transitional ordinance provided for an American High Commissioner to replace the Governor General and for the United States to continue to exercise a certain degree of authority over the defence, foreign relations, debts, loans, imports and exports, currency and immigration policy of the Philippines. The permanent features of the new Filipino constitution included a unicameral

FIRST NATIVE  
FILIPINO  
CONSTITUTION,  
1935

National Assembly, elected for three years by all men and (when a sufficient number of them have signified their desire for the vote in a special plebiscite) all women over the

age of twenty-one who pay poll tax, and who are able to satisfy a literacy test (or alternatively possess property

valued at 500 pesos), and a native-born President popularly elected for six years (but ineligible for an immediate second term) and possessing authority similar to that of the President of the United States under the constitution of 1787. Manuel Quezon, a leader in the agitation for independence, became the first President of the Commonwealth of the Philippines, as it was now called. After July 4, 1946, the name was to be changed again to the Philippine Republic. The neutrality of the Philippine Republic was to be guaranteed by the United States, and during the transitional period the American tariff was to be gradually applied to articles imported from the Islands (which had been included within the United States customs boundaries since 1909). Since 1935 there have been demands both for a reduction (mainly from the Philippines) and for an increase (mainly from the United States) in the length of the transitional period, but it now seems likely that, barring untoward events, July 4, 1946, will actually be Independence Day for the Philippine Islands, and that a notable and quite uncharacteristic piece of colonial history will be brought to a close. Whether the people of the Philippine Republic will express themselves through their libertarian institutions along the lines of the United States, along the lines of Latin America, or in a way of their own, remains to be seen, for there is no precedent, despite examination by both Japan and China of the possibilities and implications of libertarian government, to show how an oriental people, with their destinies in their own hands, will react to the stimulus of the expressionist state organization.

PHILIPPINE  
INDEPEND-  
ENCE DAY,  
JULY 4, 1946 ?

The Japanese people, whose skill in adapting western devices, ideas and institutions to their own uses has become a wonder of the world, have possessed a "western" constitution since 1889, and (to use the English of a Japanese commentator) "In the Japanese constitution there is no

JAPANESE  
CONSTITUTION  
OF 1889



change yet at all since its promulgation " fifty years ago. From this it might be inferred that the form of government adopted has proved to be satisfactory, if not to the Japanese people at least to the ruling house, for the Emperor alone can initiate constitutional changes. The western constitution had to be grafted upon one of the unshakable foundations of Japanese life, the Emperor-cult. Claiming divine descent for his house, and an unbroken line for two and a half millenia, the Emperor had to be made to stand behind and above every clause of the constitution. It was not surprising therefore that the observers sent to Europe to study western institutions before the Japanese constitution was drafted, should have been attracted to countries whose forms of government followed the legitimist rather than the libertarian tradition. In Prussia and in the German Empire, Ito and his associates found the legitimist tradition glittering with recent successes, and with the aid of the German jurist Rodolf von Gneist (who had already sought to find a common denominator between the libertarian ideals of

THE PRUSSIAN  
MODEL

England and the authoritarian traditions of the Prussian *Junker* class to which he belonged), were able to recommend a constitutional system which the Imperial house could accept yet which was unmistakably western in structure. "The fundamental principle of the Japanese government" claimed Hozumi, who was chiefly responsible for drafting the constitution of 1889, "is theocratic-patriarchal-constitutionalism", and subsequent commentators have usually hastened to hide behind the polite vagueness of this description, especially since Minobe called down censure upon himself from high places by referring to the throne as an "organ" of the state.

Only foreign commentators have had the effrontery to subject the constitution of 1889 to any very searching analysis. The constitution, though granted by the Emperor out of his divine goodness, is, once in existence,

to be regarded as "the will of the state" and is not to be changed or abolished simply by imperial decree, though the initiative for any such change rests exclusively with the Emperor. Thus the imperial house appears to have irrevocably accepted the principles of constitutional government, to be altered only by constitutional means, though it retains the authority to prevent any such alterations. In addition to having the initiative in altering the constitution (to be followed by two-thirds majorities in both legislative houses for the proposed amendment) the Emperor can legislate by decree on any subject in cases of emergency, and in addition there are certain reserved subjects (such as the succession) that can only be dealt with by imperial decree and which must not be the subject of proposals in the legislature. Though there is a careful division of functions in the Japanese state under the constitution of 1889, there is no division of powers. The Emperor is supreme head of the executive, appoints and supervises the judiciary and has an absolute veto over legislation. He is advised by a nominated privy council of twenty-six members, all of whom must be at least forty years of age. The members of the cabinet are chosen by the Prime Minister, but are responsible collectively to the Emperor and not to the diet, and all imperial decrees have to be countersigned by a minister.

The upper house of the diet is composed of hereditary members to whom are added others nominated by the Emperor, usually for life, and a certain number of members elected (subject to acceptance by the Emperor) by the lower orders of nobility, and by the cities and prefectures from among their highest taxpayers for a term of seven years (variable at the discretion of the Emperor). The lower house is elected by the people according to the current electoral law, which has provided for

POSITION OF  
THE EMPEROR

BICAMERAL  
DIET AND  
UNIVERSAL  
FRANCHISE

universal manhood suffrage since 1925, before which time there was a property qualification which kept the number of legal voters down to under half a million. Both houses may initiate legislative proposals (but the lower may not propose the alteration of the composition of upper, the upper may not initiate money bills and neither may deal with reserved subjects). The diet must be summoned each year and new elections must follow within five months of a dissolution. The House of Peers cannot sit while the House of Representatives is dissolved. The cabinet may at any time adjourn the diet for two weeks and may ask the Emperor to dissolve the lower house and to put an unpassed budget into force. Ministers may sit and speak in either house, but because their responsibility to the legislature is not provided for in

the constitution and has not subsequently developed, a "parliamentary system" of government has not come into existence in Japan. Ito formed a "government party" when he was Prime Minister in 1900 and Hara headed the first "party government" in 1918, but, forcibly divorced from responsibility, parliamentary parties in Japan have as yet created little impression upon the *régime* or upon the mass of the people. The rights and duties of the subjects of the Emperor are defined in chapter II of the constitution, which present no unusual features and appears to owe its inspiration to the Belgian constitution of 1831 or to one of its imitators. The local prefectures have elected assemblies, but the prefects are appointed by the Emperor. Though the Prussian influence is undoubtedly the strongest direct inspiration, the Japanese constitution echoes features of most of the western constitutions in existence when it was framed, yet the general impression received that all these western features have been pressed into a pre-existing mould and shaped to the exigencies of the Emperor-cult. To what extent the Japanese constitution of 1889 plays a genuine part in

NO "PARLIA-  
MENTARY"  
GOVERNMENT

the life and government of the people it is difficult for the foreigner to judge. Perhaps it is about as fundamental as are the western clothes which a Japanese puts on when he goes about his business, only to discard them for native Japanese costume directly he gets back home. When Japan went out into the world she felt that she ought to possess the fashionable constitutional garb of the successful western nations, and if she has never felt quite at home in it, it is not surprising that she should not have taken it too seriously.

Though the Ming dynasty had adopted the western calendar before the middle of the seventeenth century (and taking it from the Jesuit missionaries, China thus employed the Gregorian calendar for over a century before Protestant prejudice permitted its acceptance by England) the Manchu dynasty, which lasted from 1647 to 1921, was virtually impervious to western influences. During the last years of the dynasty the traditional examination system was abolished, and a representative system of government was promised in 1908, but it was not until the republican and revolutionary movement, which had been organized abroad (principally in Japan and the Philippines, but also in America and Europe) achieved success in 1912, that the doors to western constitutional influence

CHINESE  
REVOLUTION  
OF 1912

were opened. Dr. Sun Yat Sen, the first President, and politically the patron saint of modern China, was a product of the Hong Kong Medical College and had studied western constitutionalism in Europe and America with remarkable thoroughness. As Sun Yat Sen (or Sun Wen as he has been called in China since his death) saw western constitutional ideas and practices, so also has China as a whole tended to see them.

A certain amount of unreality surrounds the three constitutions that have been devised for China since the revolution of 1912, because circumstances have prevented any one of them from going more than nominally into

force, even in the part of China actually under the control of the government promulgating it, just as circum-

## THREE

## REPUBLICAN

## CONSTITU-

## TIONS, 1912,

## 1923 AND 1931

stances have recently prevented the adoption and promulgation of a fourth republican constitution to replace that of 1931. The provisional constitution of seventeen articles of 1912 set up a presidency on the American model and a unicameral national assembly of an equal number of representatives from each province, nominated by the provincial military governors. Individual rights were guaranteed, a cabinet system copied from France and an independent judiciary were created. This constitution remained nominally in force until 1923, when the Peking government, which exercised control over north China only, published a new constitution of a conventional western type. This was never recognized by the south, which was under the control of the Kuomintang (People's Revolutionary Party) and after the Peking government went into eclipse following the successes of the Kuomintang in central China in 1926, the new nationalist *régime* established at Nanking drafted in 1931 a fresh constitution under the direct inspiration of the ideas of Sun Yat Sen, who had died in 1925 and whose "Three Principles of the People" had already become the political bible of nationalist China. This work, together with Sun Yat Sen's will and the Kuomintang programme published in 1926, contains everything that the constitution embodies.

The three principles of the people, according to Sun Wen, are Nationalism, Democracy and Livelihood.

## THE THREE

## PRINCIPLES OF

## THE PEOPLE

Nationalism involves national independence and race equality. In the Orient only Japan and Siam are completely independent, but though China is diverse in race she can be united and independent as are the United States of America and Switzerland. Her "five nations" can become one. She needs to be accorded self-determination as defined by

President Wilson, and as a nation must revive her great tradition of learning and her inventiveness, while at the same time learning and absorbing all that is best of the West. Democracy means political rights for the people, and in the West is most developed in Switzerland, but even there it is incomplete, for to be complete it must be direct. China has little to learn here from the West, as in the past she has allowed too much individual liberty, and she must above all now learn to need a strong central government and cease to fear it. Livelihood is economic rights for peasants and workers and a solution of the problems of land and capital. China needs no cure for the evils of capitalism, but to know how to avoid them. No form of western socialism is at all suitable for China. The development of state industries, particularly textile, is most urgently needed, and the removal of unequal treaty concessions to outside powers is essential.

To bring these three principles to the people of China Sun Wen proposed and the Kuomintang in 1928 disposed that a fivefold constitution should be framed. "The constitutions of other coun-  
tries are divided into three component parts.

THE FIVEFOLD  
CONSTITUTION

The constitution of five component parts is the fruit of my labours alone" he had written. The United States had first defined precisely the threefold constitution and this had been taken as the model by many other countries; England, on the other hand, had developed not three powers but one authority, wielded by Parliament and confined at any given time to one political party; old China had possessed a system of three powers under one authority like the English, but the old Chinese system had added the powers of examination and punishment, which were quite independent of the emperor, who could himself be punished instead of being able to do no wrong. The constitution of five parts or authorities combines the Western system of three separated powers with the Chinese system of three powers subordinate to the emperor and

two independent ones. The old Chinese system and the modern English system must both be rejected because of their over-concentration of authority.

The constitution of 1931 followed these ideas as closely as the conflict of interpretations and certain obvious difficulties presented by the situation in China would permit. A government council of fifteen members, whose chairman was to be President and commander-in-chief of the forces, was set up side by side with the five councils (or *Yuan*) recommended by Sun Wen (the executive, the legislative, the judicial, the examining and the punishing). The examining council was to be responsible for national education and the punishing council would deal with the misdemeanours of, and complaints against officials, rather by analogy with the working of *droit administratif* and the administrative tribunals in certain western countries. Also in accordance with the views of Sun Wen, the citizens were to exercise the rights of universal election, the initiative, the referendum and the recall, but these were left to be worked out later. In practice this constitution was never properly applied, and in 1935 Chiang Kai Shek, who had succeeded Sun Wen as head of the Kuomintang, assumed dictatorial powers. The Japanese invasion of 1937 and its consequences have pushed the realization of the libertarian ideal, in any form, even more into the background.

## PART VIII

### NEO-NATIONAL CONSTITUTIONS— THE DERIVATIVE STATE



## *Neo-National Constitutions — The Derivative State*

*The imperial revival and the consequent preoccupation with the consequences of expansionist policies led to a period of relative stagnation in the internal constitutional sphere in most states between about 1885 and about 1905. But the decade preceding the war of 1914 saw a new quickening of constitutional activity, presaging to a certain extent the revolutionary changes of the following decade. During the course of the war certain constitutional movements were greatly strengthened by events and circumstances, and institutional reform which had been unsuccessfully demanded for several decades now occurred in a number of countries. As a result of the war very great changes in the nature, number, and boundaries of states took place, and a whole crop of new constitutions appeared in both new and existing states.*

*A general pattern, subject to wide local variations, is to be discerned in these neo-national constitutions. The unwieldy composite states tend to disappear, and smaller entities, more closely approximating to nation-states of the type developed earlier in western Europe, to take their place. Four great empires, the German, the Austrian, the Russian and the Turkish, are disintegrated, and monarchical institutions are banished from all four. The new states that appear are all republics, though certain states that associate greatly enlarged territory with royal leadership remain monarchies. Certain dependencies become separated from their mother-countries as the result of pressure or promises arising from war conditions. These emancipated territories devise constitutions of a type that fits into the prevailing pattern.*

*The post-war constitutions tend to be based upon the principles of nineteenth-century liberalism, with democratic devices carried to a logical conclusion. They exhibit more ideology than originality and only in one or two instances are they based upon native constitutional and institutional foundations to any fundamental extent. These have worn better than the purely derivative ones. Perhaps the greatest common defect was the adoption of purely political constitutions in an era which had outgrown their limitations. Constitutional efforts along the lines of economic organization were tentative. The resultant reaction was not.*

## CHAPTER XXIII

### THE SUCCESSION STATES OF CENTRAL AND EASTERN EUROPE

By the end of the nineteenth century the state and governmental system of Europe, and indeed of most of the world, seemed to have reached something approaching stability. France, Germany and Italy had devised new constitutional systems, and after the seventies amendments to these were few and insignificant. Britain and the United States of America were occupied with piecemeal social legislation and tariff controversy and with the tying up of the loose ends in constitutional systems which also had been redefined several decades earlier. Constitutional change of any spectacular sort was confined to the Balkan fringe of Europe and the more unsettled countries of Latin America. There was much activity and experiment in the government of the separate states of the United States of America and in the separate states and provinces of those regions which were to become the British Dominions, but, except in Canada, this was not yet matched on a national scale. Among the smaller libertarian countries there was a similar atmosphere of governmental stability. Even the Austro-Hungarian empire was still holding together under the *Ausgleich* of 1867, while the Russian autocracy had managed to prolong its rule without following up the economic and social reforms of the sixties by any concessions in the field of government. China remained moribund under the hand of the Manchu dynasty. Only in the extreme Orient did a new constitutional régime of primary significance appear, in the Japanese constitution

STATE SYSTEM  
AT END OF THE  
NINETEENTH  
CENTURY

of 1889, and this was a symbol of westernization rather than a contribution to political science. National boundaries were altered, but rarely in the interests of submerged nationalities. The creation of dependencies rather than of independence was the order of the day.

The events and movements of the decade before 1914 shook the complacency out of this stabilized system, and the year 1905 in particular may be compared

CHANGES  
OF DECADE  
BEFORE 1914

with 1848 and 1789 as an *annus mirabilis* in the field of government. In that year occurred the first Russian revolution, the first Douma was summoned and the organism known as the soviet was first heard of; in that year occurred Finland's "national strike" which led to the restoration of her autonomous constitution; in that year the Conservative government fell in Great Britain and the Liberal government which was to initiate the most concentrated period of social and institutional reform since the first reform Parliament of the eighteen thirties, to grant dominion status to South Africa, and to secure the passing of the Parliament Act, took office; in that year Norway secured her complete independence and the peaceful dissolution of the ninety year old personal union with Sweden. After this spectacular opening a new era of constitutional change gathered greater and greater momentum. A modicum of western constitutionalism was introduced into the government of Persia by the summoning of a national assembly in 1906, and of the Ottoman empire by the success of the young Turk movement in 1907, while in the Balkans two of the states (Greece and Bulgaria) liberated from the Turkish yoke in the nineteenth century revised their constitutions in 1911, and a new sovereign state (Albania) was created in 1913. Austria-Hungary adopted universal manhood suffrage in both empire and kingdom in 1907-8, though it did not extend in practice to Hungary. Germany, in 1911, gave representation in the *Reichsrat* and some

measure of autonomy to the *Reichsland* of Elsass-Lothringen. Two states, one in western Europe and the other in eastern Asia, gave the lie to the claim that the republican tradition was dying, when Portugal in 1910 and China in 1912 dispensed with monarchical institutions. The United States of America, after four decades of status in the text of her constitution and in the attitude of the party in power toward it, saw two constitutional amendments passed in 1913, and a President take office (the second Democrat since the civil war, representing the first real break in the "Republican dictatorship" in party politics) who possessed known radical views concerning congressional government and the state.

The war of 1914 did not therefore break the dams that had held back constitutional reform. These had already been broken. Constitutional controversy was occupying men's minds almost as much as the armaments race and an alarming series of diplomatic incidents. The budget crisis in Great Britain had no sooner been terminated by the two elections of 1910 and the Parliament Act of 1911, than the female suffrage agitation and the Irish home rule movement progressed to more bitter stages; the constitutional deadlock in Russia and in Finland following the reforms of 1905 continued to hold both sides in its grip; the constitutional schemes of the heir to the Hapsburg throne, and the rumours concerning them, continued to excite the nations and the nationalities in and around Austria-Hungary right up to (and indeed after) his assassination at Sarajevo. But the war, when it came, both gave a new and pressing urgency to the need for the solution of existing constitutional crises and produced a great many more. No nation at war wanted a large disgruntled section of its population in the rear, and dissatisfied elements were aware of this. Few nations, even those that remained neutral, could afford to ignore

CONSTITU-  
TIONAL CON-  
TROVERSY  
RIPE

OUTBREAK OF  
WAR PROVOKES  
FURTHER  
CHANGES

the trends of the time. Denmark, for instance, thoroughly overhauled her constitution in 1915. The Hapsburgs, with uncanny fatalism, did little to ensure the continued loyalty of their less privileged subject peoples ; Britain seemed to imagine that the Irish problem would hibernate " for the duration " along with other peacetime troubles, and did not even bother about promises ; but most governments hastened to grant or to promise constitutional reforms, or at least to consider them. Even Russia, in the notorious manifesto of the Grand Duke Nicholas, made overtures to the Poles, the largest submerged nationality in Europe, and the central powers were forced to outbid her, a situation of which the Poles wisely took full advantage.

During and immediately after the war most existing states indulged in a complete or partial overhaul of their constitutional machinery, but they were building upon encumbered ground. The new states which appeared on the map of Europe as a result of the war, had, on the other hand, a clean slate from a constitutional point of view, and what they wrote on this slate constitutes " one of the most fascinating chapters in the evolution of government ". Owing their existence to the success of a cause that proclaimed as its mission " to make the world safe for democracy " they adopted, almost without exception, ultra-democratic constitutions based upon the accepted principles of nineteenth-century liberalism. The

DEMOCRATIC  
CONSTITU-  
TIONS OF NEW  
SOVEREIGN  
STATES

number of democracies in the world was virtually doubled overnight, and once again the experiment could be made on a large scale that would determine whether the libertarian state could be successfully transplanted as a finished article. The only previous wholesale experiment along these lines, in the states of Latin America, had not been successful, but it had also not been conclusive. Isolated experiments had provided insufficient data. Aristotle, for the writing of his *Politics*, had more examples of democracies, as he understood them, from which to

generalize, than had anyone who wished to consider modern democracies before the third decade of the twentieth century. The appearance in Europe of the new sovereign states of Czechoslovakia, Poland, Finland, Esthonia, Latvia and Lithuania tended to redress the balance, quite apart from the existing states which joined the ranks of the democracies. Had he been writing before 1918, Bryce could easily have dealt with his "Modern Democracies" on the same scale in one volume instead of two. Had he been writing in 1938 he could again have dispensed with a second volume, for the experiment with democratic institutions indulged in by the succession states of the Austrian and Russian empires, was as short, in most cases, as it was instructive. Some choose to regard it as the Indian summer of modern democracy, others as an experiment in unpropitious circumstances that was as surely bound to fail as that started a century earlier in the new republics of Latin America. But whichever view is nearer to the truth, it is evident that the democratic institutions so enthusiastically adopted after the war of 1914-18 have, in less than twenty years, been wiped from the slate in nearly all of the succession states. In their place is too often to be found, not the clean slate with which these countries began, and on which they might have been able to make an auspicious fresh start, but an ugly smear.

Between 1900 and 1914 the map of Europe had, outside the Balkan peninsula, barely changed. Only two new sovereign states had appeared, Norway in 1905 and Albania in 1913. None had disappeared. By 1919 the map had been entirely redrawn. Two sovereign states had disappeared, and though the first, Montenegro, had been one of the smallest in Europe, the second, Austria-Hungary, had been one of the largest. Six new sovereign states had come into existence, four of them (Finland, Esthonia, Latvia and Lithuania) entirely at the territorial expense of the former

MAP OF  
EUROPE  
REDRAWN

Russian empire, one (Czechoslovakia) almost entirely on former Hapsburg territory, and one (Poland) from lands that had, since the partitions of Poland in the eighteenth century, been under three different rulers, Prussia, Austria and Russia. In addition, two Balkan states more than doubled their territories, Serbia expanding into former Hapsburg territory, absorbing Montenegro, and ultimately changing its name to Yugoslavia, and Rumania taking Hungarian Transylvania and Austrian Bukovina on one side and Russian Bessarabia on the other. The names Austria and Hungary were preserved in two small landlocked states almost lost among these new and swollen political entities. The result was a net increase of five in the number of sovereign European states between 1914 and 1919, but a decrease by one in the number of great powers. Only Poland of all the succession states came high on the list of the major secondary powers of Europe, measured by the triple criterion of size, population and wealth; only Czechoslovakia possessed, even in part, the sort of social and economic organization that had been developed in the older libertarian states; only Finland had recent experience of anything approaching a libertarian form of government. Nearly all these new or transformed states contained within their boundaries considerable minorities

PROTECTION  
OF MINORITIES

of people belonging to races or nationalities other than those which were dominant. The very names Czechoslovakia and Yugoslavia (the latter originally known as The Triune Kingdom of the Serbs, Croats and Slovenes) contained recognition of the fact that it had not been practicable to carry the self-determination of small nationalities to the logical conclusion of "one sovereignty — one nationality". Elaborate provisions for the protection of minorities under the aegis of the newly created League of Nations were offered as substitute, and the new states were expected to give in their constitutions specific guarantees

concerning the treatment of their minorities. It was not felt that either self-determination or democracy could with sincerity be pointed to as the basis of these new politics of Europe if this was not done.

The reappearance of submerged nationalities (such as the Poles, the Czechs, the Slovaks, the Ruthenians, the Ukrainians, the Croats, the Slovenes, the Finns, the Lithuanians, the Esthonians and the Latvians), the taking away from certain existing nations (such as Germany, Austria and Hungary) of their alien minorities, and the reunion with certain others (such as Italy, Rumania and Serbia) of compatriots hitherto under alien rule, gave the appearance of completion to the process of making nation coincide with state all over Europe, and had this been as real as it was apparent, governmental problems and perhaps problems of international relations might have been greatly simplified. "Nation-states" would have been the general rule, either in the form of unitary states similar to France, or as federal states similar to Germany (one main stock with local variations) or, more rarely, to Switzerland (several different stocks possessing common bonds, geographical, economic, historical, stronger than any racial or linguistic differences). New unitary nation-states of a basic type did appear in the Baltic republics (where alien minorities were small and, as in Memel and the Aaland Islands, closely concentrated), but elsewhere the tendency has been for new composite states to be created out of a mosaic of national elements, combined in new proportions, and still refusing, in the name of strong government or through the insistence of the strongest nationality within the new state, to turn to a federal constitutional solution. The new states, though their average size was much smaller than that of the states of pre-war Europe, often possessed more discordant national elements than had the Hohenzollern German empire, as much variety of lan-

NEW STATES  
TEND TO BE  
COMPOSITE IN  
POPULATION



guage, custom and race as Switzerland (though without her common traditions) and almost as much complexity, on a smaller scale, as the old Austria-Hungary itself, but they turned their backs upon federalism and attempted to impose forms of government as unitary in some cases as that of France, though a homogeneous population and a deep-seated feeling of national cohesion such as was to be found in France, did not exist.

Submerged nationalities if they were very small (such as the Ruthenian) or small separate proportions of larger nationalities if they were very isolated (such as the Germans in Transylvania) tended to appear on the surface only for a moment, to be swallowed up once more in composite unitary states dominated by large nationalities that were able to keep their heads above water (sometimes it seems, only by standing on the smaller peoples' heads, or at least their toes). One small nationality actually independent for many centuries was swallowed up by this calculated process of territorial and national rationalization which followed the earlier enthusiasm for complete self-determination, and if the Montenegrins could not save their independence, how could the Ruthenians and the Lithuanians and the Siebenburgen Germans be expected successfully to assert theirs. Ironically enough, of the

FEDERAL  
CONSTITU-  
TIONS THE  
EXCEPTION

new and transformed states of Europe only one adopted a definitely federal system of government, a country of homogeneous race and language that had been prevented from adhering, as a unit, to a larger federation. This was Austria, within whose post-war boundaries not merely one nationality only, but only one portion of one nationality was to be found. The irony has now been made even greater by the disappearance as a sovereign state of Austria, the first and as yet the only one of the new post-war states to be effaced from the map of Europe, along with her elaborately federated constitutional system.

Thus, some form of federalism, which seemed so

obvious a solution to the governmental difficulties of the new states of Europe (whose boundaries were rarely coterminous with those of a single nationality), was almost universally rejected (while in Austria, where alone it was introduced, it has not survived, and neither has Austria), although within many of the new unitary states various systems of local autonomy and various provisions for the protection of minorities have been set up, following in some cases the holding of plebiscites. Sometimes these have been under international guarantee, but in no case has the full sovereignty or the completely unitary nature of the state concerned been impaired. Promises of local autonomy have tended to be honoured only after long delays, when not entirely disregarded, and the hundreds of petitions from national minorities that have been received by the League of Nations and the signatory powers to the minority treaties, bear witness to the attitude of most of the new states to their obligations toward their minorities incurred by these treaties and, in some cases, by clauses in their constitutions. Few of them are today in a position to call the old Austro-Hungarian empire black in its minority policy, and the empire had made far fewer promises.

PROMISES OF  
LOCAL AUTO-  
NOMY RARELY  
HONOURED

Within the succession states, though federalism was universally spurned, the unitary principle was applied with varying degrees of ruthlessness. Though perhaps a federal constitution appeared to be the perfect answer to the Yugo-Slav's prayer, the constitution of 1921 of the kingdom of the Serbs, Croats and Slovenes was the most unitary of them all. Though the other nationalities, led by the Croats, advocated a federal system, the Serbs insisted that a unitary state already existed and forced their point of view upon the constituent national assembly. Copying the departmentalization of France in the era of the first revolution, Yugoslavia was arbitrarily divided into a chequer-board of small departments or counties,

RUTHLESSLY  
UNITARY  
YUGOSLAV  
CONSTITUTION  
OF 1921

each with its prefect appointed by the central government. The historic divisions and nationality boundaries were deliberately avoided. Croats and Slovenes found that they had exchanged masters instead of entering a free partnership, and Montenegrins, who unlike these, had never been under Turkish, Magyar or Austrian domination, also came under the steam-roller pressure of the Serbs. Cetinje was not vouchsafed Vienna's nineteen years of precarious post-war existence as a capital city, though as late as 1927 (and perhaps to this day) its inhabitants seemed still to regard it as merely a bad dream that its ring of consulates and legations and the bar of its Grand Hotel were not occupied by representatives of the principal countries of the world, that its palace and its cathedral were not presided over by the picturesque figure of Prince Nicholas, whom their early enthusiasms had deposed, and that its government building did not transact more than the desultory business that Belgrad conceded to a departmental administration.

In Poland also, federation was desired by some of the minority nationalities in the new state, but the Poles themselves were anxious to erase the memory of partition and to rebuild as soon as possible a powerful national unity, and the Galicians, the Lithuanians, the Germans and other minorities found themselves in a unitary, centralized state, again strongly influenced by the administrative system of France, though in Poland the historical and traditional divisions were retained for local government purposes. The seizure of the Vilna region, containing a further million Lithuanians, in 1920, complicated the problem of ruling Poland as a unitary state, and her minority troubles (not to mention the troubles of her minorities) have been grave and extensive.

Some other succession states with considerable minority problems adopted solutions less uncompromisingly unitary. Lithuania granted an autonomous position to the Germans

UNITARY  
POLAND  
ALSO COPIES  
FRANCE

inhabiting the port of Memel, Finland gave complete autonomy to the Swedes in the Aaland Islands, and Czechoslovakia recognized Carpathian Ruthenia as an autonomous territory, with its own diet, a native Ruthenian governor (appointed by the President of Czechoslovakia though responsible to the Ruthenian diet) but was most dilatory in establishing this machinery. Though Finland, in addition to the autonomy for the Aaland Islands, also recognized complete equality of rights as between her mainland Finnish- and Swedish-speaking inhabitants, Czechoslovakia was tardy in recognizing the claims to special treatment of the Slovaks, the Poles of the Teschen district (where the international boundary inconveniently bisected the main street of the town of Teschen), the Magyars and the Suedetic Germans who lived within her boundaries. Once again the emphasis upon strict national unity was firmly insisted upon by the dominant nationality within the state, the Czech leaders having apparently examined and rejected the idea of a constitutional system similar to that of Switzerland. Though Czechoslovakia's minority policy has been by no means so unfortunate as that of certain other succession states, the pressure of recent events has caused her to reconsider her position as a strictly unitary state at a moment far less happy for her than such second thoughts might have been two decades earlier.

STATES LESS  
UNCOMPRO-  
MISINGLY  
UNITARY

The constitutional systems of the various succession states had to be superimposed upon the complicated cultural, linguistic and ethnic situations existing in most of them after the post-war settlement had established its equivocal "self-determination for small nations", and neither their constitutions nor their fate can be understood if these complications are for a moment ignored. Just as the drawing of boundaries was, ideally, according to a principle (a century earlier it had been "legitimism" and now it was "self-determination"), so also was the

drawing up of forms of government to operate within these boundaries. The world was to be made "safe for democracy". Autocracy, legitimism and even monarchy were discredited on the continent of Europe by the defeat or collapse of the chief exponents of these principles. The leaders of the victorious allied and associated powers had been a democratic unitary republic (France), a democratic federal republic (the United States of America), and a democratic limited monarchy (Great Britain), the last of these linked in somewhat amorphous political union to (but most tangibly assisted by) what were, in effect, a group of democratic federal and unitary republics. Their most prominent associates had been a democratic limited monarchy of classic design (Belgium), a demagogic limited monarchy of romantic inspiration (Italy) and a Balkan monarchy of great national vigour with a constitutional *régime* and some libertarian achievement (Serbia). The one autocracy associated with them at the beginning (Russia) had been transformed under the strain of war into a new type of political community of which post-war Europe knew little and feared much, for it had deserted the allied cause and now preached world revolution in the name of the labouring and exploited masses. This was not what the *bourgeois* leaders of the Czech and the Polish national movements had worked, prayed, or bargained for, or the Italian, Serb and Rumanian irredentists agitated, intrigued and fought for. They found it easy to turn their faces away from Russia either as she was or as she had been. For them, where Russia began, Europe ended.

The three Baltic republics of Esthonia, Latvia and Lithuania, felt themselves able, with their small size and relatively homogeneous populations, to adopt simple and direct forms of democratic government. In their respective constitutions, put into force between 1920 and 1922, they all three

A WORLD  
"SAFE FOR  
DEMOCRACY"

THE THREE  
BAL TIC  
REPUBLICS

provided for unicameral legislatures, elected for short terms by the people on a basis of universal suffrage, with a secret, direct ballot and proportional representation. The ministry was to be strictly responsible to the diet and was required by the constitution to resign on an adverse vote. Ministers were permitted to be members of the legislature. It was made clear that the people as a whole was sovereign, even though its representatives in the diet normally acted in a sovereign capacity on its behalf, and this fact was reinforced by provision for popular referendum and initiative. Both Lithuania and Latvia provided for a president, to be elected as formal head of the executive (popularly elected for seven years in Lithuania, and elected for three years by an absolute majority of the diet in Latvia), but Esthonia (alone of the new states, and only matched by Prussia among the transformed states) dispensed with a titular head of the executive altogether. The ministry was formed from and by the diet, and the Prime Minister, who took the title of "state-elder", was the highest executive officer in the state.

These three ultra-democratic constitutions, with state machinery simplified (especially in Esthonia) to the greatest possible degree, were completely derivative. They had no indigenous roots in the past, for these territories had hitherto

CONSTITUTIONS  
COMPLETELY  
DERIVATIVE

been autocratically ruled (for centuries past by an alien bureaucracy), and they reacted away from the soviet experiment that was being conducted by their former fellow subjects of the Tsars just across their borders. The libertarian state was taken over ready-made; certain of its more decorative features, such as second chambers and (in the case of Esthonia) titular executive heads, were shorn off; all its expressionalist functionalism was retained. Unhappily this new basic constitutionalism has proved at once too simple and too complex for the three Baltic republics. Lithuania, weakened and humiliated by

the loss of her historic capital and nearly a half of those she regarded as her rightful citizens at the very outset of her career as an independent state, was the first to abandon her democratic form of government. In 1926, soon after Pilsudski's *coup d'état* in Poland had made her large neighbour (with whom she had not been on speaking terms since 1920) appear less democratic and even more menacing than heretofore, a dictatorial *régime* of national

LITHUANIA  
ABANDONS  
DEMOCRACY,  
1926

concentration was set up in Lithuania as a measure, it was claimed, of national self-preservation. The democratically elected diet, which had been virtually a sovereign parliament under the constitution of 1922, was suffered by the government to continue to exist in impotence until 1927 and then was dissolved. A revised constitution was prepared and promulgated by the government in 1928, and this constitution considerably increased the power of the President on the one hand, and of the people on the other as against that of the diet. But no new diet was summoned for a number of years, and until after the franchise had been amended to provide for its indirect election for five years through local bodies. As the constitution of 1928 had removed the provision that local government bodies must be democratically elected, it was possible for the government to control very closely the selection of candidates and the return of members. The diet elected in 1936 on the new basis contained only two members out of forty-nine who were not avowed supporters of the *régime*, but the government, apparently not fully satisfied by such lack of unanimity, now aims once again to amend the constitution and the franchise with a view to establishing the full machinery of a corporative state. The effect on domestic policy and upon constitutional reform in Lithuania of the re-establishment of normal diplomatic relations with Poland, at the more than pressing invitation of the latter country, in March 1938, remains to be seen.

Both Latvia and Esthonia retained their democratic systems of government until 1934, when, under the shadow of the economic depression and no doubt influenced by the establishment of authoritarian *régimes* elsewhere in Europe, they turned to emergency forms of government which they have since been endeavouring to put on a more regular basis. In Esthonia, continued agitation for the filling of what was regarded by an influential minority as a gap in the constitution of 1920 by the provision for the election of a president of the republic, resulted, after popular rejection in a referendum held in 1932, in the adoption of the proposal in a fresh constitution promulgated in January 1934. Under it a president was to be elected for five years by the people as a whole, and was to possess wide powers. The Prime Minister was to exercise the duties of the President pending his election. The assembly was still to be democratically elected, but was no longer anything approaching a sovereign body. But on March 12, 1934, before the new constitution could go properly into force, the government assumed dictatorial powers and the diet was prorogued. The Prime Minister continued to "act" as President, a neat compromise, from the point of view of the *régime*, between the presidentless republic of 1920 and the presidential republic provided for in the constitution of 1934. The proposal that a third constitution should be framed was endorsed by a popular referendum in 1936, and it was expected that in Esthonia the new machinery would be that of a corporative state, involving a permanent suppression of the diet and the abolition of the direct democratic franchise, but to the surprise and relief of all democrats, the new Esthonian constitution of January 1, 1938, provided a bicameral legislature with a popularly and freely elected lower house (though without proportional representation), while the President was

LATVIA AND  
ESTHONIA  
FOLLOW SUIT,  
1934

ESTHONIA  
PUBLISHES A  
DEMOCRATIC  
CONSTITUTION,  
1938



also to be popularly and directly elected. Latvia has possessed an authoritarian *régime* since May 1934. Here, also, the democratic constitution of 1922 was laid aside in favour of an emergency government in which the Prime Minister acts as President. The diet has ceased to meet and legislative power has passed to the ministry. From an all-powerful legislature barely checked by the titular executive head or by the sovereign people, Latvia has run true to type and come the full circle to government by an all-powerful executive unhampered by any elected legislature and claiming, without bothering about any democratic appeal to them, the full support of the people. But democrats in the old-established libertarian states should not, from their eminence of relative prosperity and security, judge these small Baltic republics too harshly for their backsliding. They embraced democratic institutions on trust at a time when the world was claimed to be safe for democracy, but after a number of years of meagre and dangerous living as independent political entities, they decided, rightly or wrongly, that democracy was not very safe for their particular part of it. Nevertheless, Esthonia seems now prepared to try it once again.

It is Poland, perhaps, of all the new states to emerge from the European settlement of 1918-20, that has administered the greatest rebuff to believers in the universal applicability of the democratic principle, though Poland has as yet gone by no means as far as a number of other countries in the direction of a completely authoritarian form of government. It is perhaps because so much was expected of Poland as a democracy that the disappointment has been specially great. The restoration of the political sovereignty of the Polish nation in a state of considerable size and significance in Europe and the world, was undoubtedly the most spectacular and gratifying positive achievement of the peace settlement.

MUCH  
EXPECTED  
OF POLAND  
AS A  
DEMOCRACY

The dismemberment of Poland had been upon the conscience of the world for nearly a century and a quarter. The nineteenth century, with all its development of the principle of nationality, had left it for the twentieth to give to it, in *Polonia Restituta*, its supreme vindication. If Poland could not be saved for democracy, what future had that principle of government as a world force ?

The democratic Polish constitution of 1921, which replaced the temporary or "little" constitution of 1919, had theoretically much to commend it, but in practice it proved quite unsuited to the needs and incipient political experience of the new republic. Though it spoke in its preamble of "taking up the glorious tradition of the memorable constitution of the third of May" this new Polish constitution inherited that defiance of strong government against which the constitution of May 3, 1791, had been in a way a reaction. Indigenous constitutional traditions being too remote to provide a comprehensive guide to Poland's constitution-makers in 1919 and 1920, they borrowed freely from the libertarian states, large and small, incorporating most of the latest devices of popular government, for Poland was to be resurrected as the ideal republic of the twentieth century, based upon constitutional ideas that had risen to pre-eminence during her period of submergence. Avoiding the "presidential" bias of the United States and the "ministerial" bias of Britain, the Poles attempted, as in France, to establish the sovereignty of the people by giving a definitely "parliamentary" bias to their instrument of government. That is, they let the legislature overshadow both the President and the cabinet.

POLISH  
CONSTITUTION  
OF 1921

The French constitution of 1875, itself a creaking door that had never quite come off, seemed to most Poles to enshrine, after forty-five years of existence, that happy combination of weakness in normal circumstances with

strength in the face of national crisis, which made it the most perfect democratic constitution yet devised, and the French constitution of 1875, as amended up to 1921, was

FRENCH  
CONSTITUTION  
EXTENSIVELY  
COPIED

extensively (even to its actual wording) copied by Poland. As was only natural, the Poles sought to improve upon it, and in so doing, pressed some of its tendencies almost to their logical extremes. Thus, no other post-war constitution went so far as that of Poland in the limitation of the power of the executive. Though it was declared (article 2) that "Sovereignty in the Republic of Poland belongs to the nation", Poland in 1921 nevertheless deformed this principle by returning to her old love, a sovereign diet. "On a crée une république plus parlementaire (si on peut s'exprimer ainsi) qu'en France." Poland emerged in 1921 as "an almost decapitated state", with President, ministers, Senate, local administration, and even the courts, dependent to some extent upon the

AN ALL BUT  
SOVEREIGN  
LEGISLATURE

good or bad will of the Diet, or *Seym*. This all but sovereign Chamber of Deputies was to be elected for a term of five years by secret, direct, equal and proportional voting, by all citizens of either sex over twenty-one years of age, deputies to be at least twenty-five years old. Once elected, it could only be dissolved of its own volition, or by the President supported by a three-fifths majority of the Senate, which (unlike the French Senate) by such a vote automatically dissolved itself as well, and which, therefore, would be even less inclined to exercise its powers in this direction. The constitution could be changed by an ordinary statute passed by a special majority of the legislature, and, like that of 1791, was to be open to general revision every twenty-five years by the *Seym* and the Senate acting together as a national assembly.

A series of governments faced a series of crises in Poland between 1922 and 1926, and then Marshal

Pilsudski, returning to the political arena (he had spurned the Presidency under the constitution of 1921) produced, by a *coup d'état*, an entirely new situation. Though it would undoubtedly have been possible for him to destroy the constitution completely, he contented himself, for the time being, with overthrowing the government in favour of one that had his confidence, with securing the Presidency for his nominee (after again refusing the office himself) and with allowing the *Seym* to legalize the changes he was making, instead of dissolving or abolishing it. The constitution was amended to give the President the right to dissolve the legislature without the consent of either house and to issue interim decrees, and to allow the legislature to discuss the budget for a limited period only each year, after which time, if it was not passed, it could become law in the form desired by the government without the consent of either house. Thus, apart from the actual *coup*, constitutional forms were preserved, but the executive was very considerably strengthened against the legislature, and Poland could no longer be regarded as a stronghold of libertarian government. The very first *Seym* elected (in 1922) under the constitution of 1921 had, under pressure, abdicated its dominating position in the state, and the second President (the first had been assassinated after only a week in office) was forced by Marshal Pilsudski to resign after serving barely half his term. But at first the new powers obtained by the executive in 1926 were not used as much as might have been expected, and the legislature was allowed to continue to the end of its full term of five years. But after the elections of 1928, in which the "non-partizan bloc for co-operation with the government" disappointed Pilsudski by failing to secure a clear majority of seats, "Parliamentary life [as Dyboski admits] became more ineffectual; sessions were only called to be adjourned at once, even budget

PILSUDSKI'S  
COUP D'ÉTAT  
OF 1926

AMENDMENTS  
CONSIDERABLY  
STRENGTHEN  
EXECUTIVE

discussions did not reach their natural end, to say nothing of other legislation . . . ministers who had received votes of 'no confidence' in parliament were re-appointed. Parliament, in fact, had ceased altogether to fulfil any of its traditional functions, and was leading an almost purely formal existence."

In the elections of November 1930 the "non-partizan bloc", with the assistance of every resource and facility that the government had to offer, secured a clear majority in the *Seym* and a two-thirds majority in the Senate. Here at last was the nemesis of that party system against which Pilsudski had raged so often. "Poland cannot recover on a policy of party", he had said.

ATTACK  
ON PARTY  
GOVERNMENT

The way was now clear for his alternative programme, and the majority that had been assembled made it possible for him to continue to make use of constitutional forms for perfecting, according to his lights, what many were already calling "a veiled dictatorship" and some a number of things even more harsh. Pilsudski's method of using constitutional means for achieving anti-constitutional ends was comparatively novel when he first employed it. He has since had illustrious imitators.

Scorning the democratic state, and at the same time recoiling from the full implications of its new antithesis, the fascist state (the soviet state had, of course, been ruled out from the beginning), Marshal Pilsudski designed or inspired a new constitution for Poland, to succeed that of 1921, which traced a *via media* between them, and which (because there is no logical *via media* between democracy and fascism) was and remains an expedient.

PILSUDSKI'S  
CONSTITU-  
TIONAL IDEAS

As early as March 26, 1930, Pilsudski had, in an interview granted to the *Gazeta Polska*, outlined his new constitutional system, but the constitution itself was not promulgated until April 1935, less than three weeks before his death. It set up, as he had foreshadowed, a strictly presidential system of

government. "It is desired", he had said, "that the President shall be made a factor superior to the other powers by conferring upon him: firstly, with regard to the executive power, the right to appoint and to dismiss the government; secondly, with regard to the legislative power, the right to open, to close and to dissolve the parliament, as well as to legislate by decrees when the parliament is not in a position to perform its function; thirdly, with regard to the judicial power, the right to appoint the judges and the right of pardon." The constitution of 1935 followed this forecast closely. The President, indirectly elected (in normal circumstances) by a small number of notables for seven years, and capable of immediate and unrestricted re-election, is given in section II of the constitution all these powers and more, and is referred to (article 11) as "an element of sovereignty in the state". The legal sphere of activity of the Polish President, from being less important than that even of the French President, is made far greater than that of a President of the United States of America.

POLAND'S  
"ULTRA-  
PRESIDENTIAL"  
CONSTITUTION  
OF 1935

While under the constitution of 1935 the Polish President calls the tune, the government (section III) seems to exist to pay the piper. Its organization is defined by a decree of the President (article 25): ministers are politically responsible to the President (article 28) as well as constitutionally responsible before the Tribunal of State (article 30), while their parliamentary responsibility to the *Seym* remains (article 29). The *Seym* itself is severely restricted to a strictly legislative function, and "the functions of governing the state do not belong to the *Seym*" (article 31). Its membership is halved. The franchise is restricted and the minimum age of representatives raised to thirty (article 33 and special law of July 10, 1935). Proportional representation disappears.

THE  
LEGISLATURE  
MADE  
RELATIVELY  
UNIMPORTANT

The Senate is only briefly referred to in the constitution, but is drastically reorganized by a special law (also passed on July 10, 1935). By it the President appoints one-third of its members and the remainder are indirectly elected through electoral colleges by a select class of "active citizens" in the different provinces in proportion to population, Warsaw as capital city having special representation over and above the Warsaw province. It is made clear in section IV of the constitution ("Legislation") that presidential decrees (either regular or emergency) have a sphere at least as important as have laws, and residual legislative power is apparently left in the hands of the President and not in those of the *Seym* and Senate (article 57). Section VII, on the budget, follows closely the constitutional amendment of 1926, adopted after the *coup d'état*, and the important office of Inspector General of the Armed Forces, created for Pilsudski in 1926, remains in existence.

Amendment of the constitution of 1935 (section XIII) is made reasonably easy, but while amendments proposed by the President require only ordinary majorities in the *Seym* and Senate to secure adoption, those proposed by the government or by the legislature have to be accepted by at least half the total membership of each house, while the President is able to postpone promulgation of a constitutional amendment originating in the *Seym*. The authority of the President is thus underlined in almost every clause of the constitution and "Parliament plays a very minor rôle in governing the country". Poland, whose tendency to choose as chief executive one of her most eminent citizens in a sphere other than politics (though the term of her first Premier, Paderewski, was short and sharp) is marked, has had since 1926 as President an eminent chemist, who has been content to act as figurehead of state and who has never himself made personal capital of the *quasi*-dictatorial powers given him partially by the amendments of 1926 and substantially by

the constitution of 1935. The power behind the presidential chair was Marshal Pilsudski, and the new constitution was framed to give this power fuller scope, but on May 1935, only three weeks after it came into force, Pilsudski inconveniently died.

THE POWER  
BEHIND THE  
PRESIDENT

The danger of framing a constitution that presupposes the existence of a superman at the helm, or behind the scene of affairs, is that this same constitution may not bear the strain of being operated and controlled by men of more ordinary powers or prestige. Poland has not yet made the dead hand live again in the machine it fashioned, but the success or failure of the ultra-presidential constitution of 1935 ought to be followed with particular interest by those countries and peoples to whom the inexorable processes of time will sooner or later present problems similar to that with which she was presented by the death of Marshal Pilsudski. Is it possible, with the aid of a written constitution, for a personal dictatorship or *quasi*-dictatorship to be put into commission?

Of all the new succession states only two, Finland and Czechoslovakia, have substantially adhered to the democratic institutions which they adopted when they became independent, and in each case there was a special reason. Finland, though under the sovereignty of the Russian Tsars between 1809 and 1917, had preserved an autonomous position, and, in 1906, adopted universal suffrage and proportional representation of an advanced type when her old Swedish four-class diet was transformed into a modern parliament. Difficulties with the Russian government had prevented the smooth working of the new system during the last decade of the connection with Russia, but it was still in existence in 1917 and the Finnish people were already becoming used to it. Thus libertarian institutions were not suddenly flung into Finland's lap in 1918 and 1919; they were simply given the scope that

FINLAND  
RETAINS HER  
DEMOCRATIC  
INSTITUTIONS



had as yet been denied to them. For this reason, Finland has not only resisted the powerful counter-attraction of soviet institutions, but has also as yet shown little tendency toward dilution of her democracy in the direction of the corporative state on the fascist model. She has drawn nearer in sympathies and in government to the model of advanced democracy provided on the other side of the Baltic by Sweden and Norway, than to her neighbours on the continental side of that sea. Her repudiation of the soviet system has always been emphatic, and at times savage, but for a decade and a half she has not felt the need to waver from the libertarian ideal on any plea of "national emergency".

The Finnish constitution of July 1919, which still remained in force without substantial amendment in 1938, was not a complete constitutional system in itself, for it was meant only to supplement the organic law of 1906, which (apart from the changes due to the establishment of an independent republic in the place of the autonomous province of an empire) remained in force, but it was also found necessary, so completely had Finland under Russian sovereignty retained the forms of her old Swedish governmental system, expressly to repeal the Form of Government of 1772 and the Act of Union of 1789. The constitution thus incorporated the reformed diet and universal franchise (for both men and women at the age of 24) of 1906, but made no mention of the Senate or upper chamber that had come into existence as an instrument of Russian domination during the sovereignty of the Tsars, so Finland (her diet having been changed from four estates sitting separately to a single assembly by the law of 1906) now joined the ranks of the unicameral states. The President was to be indirectly but popularly elected (like the President of the United States, by an assembly of electors chosen by all who could vote in ordinary elections) for six years, and his immediate or successive re-election was

THE FINNISH  
CONSTITUTION  
OF 1919

not prohibited. He possessed, with the diet, the initiative in legislation and also a suspensive veto, but the ministry (a member of which must countersign every presidential act) was made responsible to the legislature and not to him, and could not continue in office after its confidence has been withdrawn. Though his popular election and his responsibilities make of the Finnish President much more than a cipher in the state, the government is definitely of the "parliamentary" type, with the unicameral legislature acting as the instrument for the exercise of the sovereignty of the people, which is fully recognized and safeguarded.

Czechoslovakia, carved almost entirely out of the northern provinces of the Austrian empire and the Hungarian crown when these disappeared, was given the most startling shape and the most vulnerable strategic position of all the new states of Europe. For this and other reasons her constitution makers persuaded themselves and the great powers under whose wing she had come into existence, that the luxury of a federation of the Swiss type could not be indulged in, and (despite the presence of Czechs, Slovaks, Ruthenians, Magyars, Germans and Poles within the boundaries of the new state) that it must be strictly unitary, though a special measure of provincial autonomy was to be conceded to Carpathian

CZECHO-  
SLOVAKIA  
DEMOCRATIC  
BUT UNITARY

Ruthenia, whose people stood entirely apart in culture as well as in race. But though the principle of "self-determination" for small nationalities was thus not very logically applied, every endeavour was made to offset this limitation by making Czechoslovakia safe for democracy, and therefore to give to every individual the fullest means of self-expression as a citizen of the Czechoslovak state, if only he would accept that citizenship and no other.

The Czechoslovak constitution of February 1920, like the Finnish of 1919, also remained in force in 1938, despite the previous absence of truly libertarian institutions in any part of the old Austro-Hungarian empire. Perhaps

the chief reason for the survival of democratic institutions in Czechoslovakia, whereas they either tended to dis-

THE CZECHO-  
SLOVAK  
CONSTITUTION  
OF 1920

appear or else disappeared completely in her neighbours Germany, Austria and Poland and in all the other succession states except Finland (while they never existed in Hungary), was the extreme closeness of her connection with the leading libertarian and expressionist states of western Europe and the intimate way in which her future as an independent state was bound up with their friendship. If democratic institutions are a luxury for a country with many minority problems, with many vulnerable frontiers and with many jealous neighbours, they are at least a luxury that may retain the all-too-necessary sympathies of the libertarian great powers. As these sympathies are withdrawn or come to be regarded as of less value than heretofore, it is not improbable that the luxury, however

A DEMOCRACY  
BY BOTH  
NECESSITY  
AND CHOICE

highly it is prized for its intrinsic worth in Czechoslovakia, may be abandoned for a system of government more in the spartan tradition of her nearer neighbours, to ward off, if possible, the even worse fate that threatens her. But until or unless that happens, she may attempt to persevere with a bicameral legislature (both houses being directly elected by the same voters on the basis of a universal franchise, the Chamber for six years and the Senate for eight); with a President elected, like the French President, for seven years by the two houses in joint session (though Thomas Masaryk her first President was given the office for life, or until he chose to resign, as he did in 1936, a year before his death); and with a Supreme Administrative Court protecting the rights guaranteed to the citizen by the constitution. The lower house had the dominating position in the state. Though legislation (except army and money bills) could originate in the Senate, it had (like the President) only a suspensive veto, while its adverse vote (unlike that of the Chamber)

could not force the resignation of the ministry, which was responsible to the Chamber only. Sovereignty of the people was proclaimed in article 1 of the constitution, and, until 1938, the most precariously situated of all the democracies continued to give it collective reality.

The extent to which the truncated *ex post* Munich Czechoslovak state can continue to use the political institutions of 1920 is highly problematical. The newly conceded autonomy of what was to remain under Czechoslovak sovereignty of Slovakia and Ruthenia, and the emergency increase in the vigour of the executive power in the state, together with the complicated economic and political problems connected with the new "Sudeten" frontier of Bohemia and Moravia, and the reorientation of foreign and commercial policy necessitated by the engulfing of Czechoslovakia by the *Drang nach Osten*—all these factors combine to produce decisions favouring a new constitutional system, which at one and the same time shall recognize the realities of the first partition of Czechoslovakia (even the name of the state, it is suggested, should be altered) and help to ward off what the Polish constitution of 1791 failed to do for a neighbour (whose historic role was now strangely reversed) a century and a half before.

## CHAPTER XXIV

### THE REINCARNATION OF EXISTING STATES IN NEW CONSTITUTIONAL FORM

TERRITORIAL losses, resulting as they usually do either from defeat in war or from submission to the threat of force, tend to discredit the political *régime*, and sometimes the constitutional system as well, under or through which they were suffered; but territorial gains, even though the geographical, economic and ethnic characteristics of a state are just as profoundly modified by them as by losses, tend only to strengthen the existing *régime* and to expand its constitutional system. As a consequence of the war of 1914-18 the new sovereign states of Czechoslovakia, Poland, Esthonia, Latvia, Lithuania and Finland were created, and two sovereign states, Austria-Hungary and Montenegro, disappeared, but a number more were radically transformed. The residua of the dehyphenated Hapsburg monarchy, Austria and Hungary, along with Germany, Bulgaria and Turkey, all suffered the consequences of defeat in territorial losses, and only one of these, Bulgaria (who had least to lose and whose losses were relatively slight), did not also undergo a political and constitutional transformation sufficiently complete to sweep aside the existing dynasty and constitution. Serbia (transformed in name as well as in extent into the Kingdom of the Serbs, Croats and Slovenes, later shortened to Yugoslavia) and Rumania were fundamentally transformed by territorial gains (in each case more than doubling in area), but in each the reigning dynasty remained in power and, though new constitutions were promulgated, these involved no im-

THE CONSE-  
QUENCES  
OF DEFEAT.  
GERMANY,  
AUSTRIA,  
BULGARIA,  
TURKEY

portant modifications of the system of government hitherto existing in the territory ruled over by the dynasty, but simply incorporated the necessary technical modifications consequent upon territorial expansion. Each was a "limited" monarchy that had been inoculated with the libertarian constitutionalism of the expressionist state in the late nineteenth century when the liberation of their peoples from the Turkish overlordship had been confirmed, but concerning neither could it be with confidence said that the serum had taken. They remained potentially prone to every kind of governmental chaos or tyranny, and, with their territorial expansion out of the Balkans proper into central Europe, the constitutional accident-proneness that the countries of the Balkan peninsula had tended to develop since their liberation (the countries of Latin America present a more chronic parallel) was spread over a much larger area. This "Balkanization" of much of central Europe was one of the unexpected consequences of the war — and of the peace.

THE FRUITS  
OF VICTORY.  
SERBIA AND  
RUMANIA

Unlike the new states whose creation was a by-product of the victory of their sponsors, the states which were transformed by the consequences of defeat followed no general pattern in the reorganization of their constitutional systems. Bulgaria retained her old dynasty and constitution, though King Ferdinand was forced to abdicate in favour of his heir. In the post-war era of enthusiasm for democratic government the unicameral legislature set up by the constitution of 1879, and now elected on a basis of universal manhood suffrage, was more frequently allowed to play the part written for it in the constitution, but in 1934 Bulgaria followed a more recent fashion when the legislature (or *Sobranie*) was dissolved and no new elections held, the government continuing to rule in the name of the king and strengthening its hold over the country by a drastic reorganization of local

BULGARIA  
RETAINS HER  
DYNASTY AND  
CONSTITUTION

government. The mooted new or revised constitution and electoral laws had, up to 1938, showed no signs of appearing.

Turkey, after a period of transition during which the Sultanate (until 1922) and the Caliphate (until 1924) lingered on at Constantinople, while the government of the Grand National Assembly established by Mustapha

TURKEY  
BECOMES A  
SECULAR  
REPUBLIC

Kemal Pasha at Angora was consolidating its power, became a secular republic with Kemal Pasha as President. The sovereignty of the Turkish people, "the last of the sub-

ject races of the Ottoman Empire to achieve their national independence", had been proclaimed, and a popularly elected unicameral legislature (the Grand National Assembly) provided for as early as 1921, after which (1924) the outlines of a libertarian constitutional system were completed by giving a four-year term to the legislature, by more closely defining the authority of the President and by making the ministry responsible to the Assembly. The dynamic personality of the Ghazi Kemal Pasha, (known after 1934 as Atatürk) who became and remained President of the republic, continued to dominate the government and the constitution. Lacking that passion for self-effacement (or that prudence) which made Pilsudski rule Poland from behind closed doors and shuttered windows, he, by personal domination, with the close co-operation of his Republican People's Party, of his ministry and of his legislature, completely

TRANSFORMA-  
TION OF  
TURKISH LIFE

transformed the Turkish state and Turkish social life during his presidency. Islam ceased to be the religion of the state, the wearing of the fez was prohibited, the Roman alphabet was introduced, the law and the language were made "national" (Constantinople became "Istanbul" and Angora became "Ankara"), women were emancipated and enfranchised. After experimenting with parliamentary government of the traditional sort by creating

a substantial "opposition" party (but achieving little more semblance of it than had the Sultan under the "Britannic" constitution of 1876), the Atatürk, with equal deliberation, destroyed the opposition, leaving virtually only members of the People's Party in the legislature (or *Kamutay*). Thus by a highly individual process the republic of Turkey has come to resemble in organization the one-party, one-leader, one-people state that has developed elsewhere, and in some respects her organization in this direction was ahead of all others. Her libertarian institutions were never intended as instruments of the expressionist state, but as badges of her modernity as a nation-state *qua* nation-state.

Hungary went through a similar period of indecision concerning her ultimate form of government following the abdication of Charles Hapsburg in 1918. The "people's republic" with Karolyi as president and a unicameral provisional legislature, was succeeded in rapid succession by the soviet republic with Bela Kun as political commissar and by the reaction which produced the restoration of the old Hungarian constitution with Admiral Horthy as regent in a monarchy without a king.

PEOPLE'S  
REPUBLIC,  
SOVIET STATE  
AND REGENCY  
IN HUNGARY

Universal suffrage, proclaimed by the people's republic and first applied in the elections of 1920 after the soviet republic had been overthrown, was the one gesture made by the new Hungary in the direction of the prevailing democratic trend, and even then the secret ballot did not become the rule in elections. Only in 1938 was its general adoption announced. Land reform, an even more pressing need, promised by the people's republic and decreed by the soviet republic, but postponed by the regency, did not by 1938 appear to be in sight. A personal restoration of the monarchy appeared to be postponed to the Greek Kalends, and the *régime* of the regency can now be regarded as, *de facto* at least, Hungary's third republic. Whatever political and constitutional changes take place



in the near future in this country with neither a coastline nor a king which nevertheless officially styles itself a monarchy and has an admiral as its regent, they can hardly make her position as a state and her form of government more anomalous than they already are.

Austria's position between 1918 and 1938, though very different, was equally anomalous. Prevented from amalgamating with Germany, German-  
 OVER-  
 FEDERALIZED Austria became the chronically over-  
 ULTRA-  
 DEMOCRACY federalized ultra-democratic republic of  
 OF AUSTRIA Austria, and adopted all the devices of the expressionist state; but her undiluted libertarian *régime* lasted less than a decade and her independent though divided sovereignty less than two. On March 13, 1938, she became part of the German *Reich* and its system of government was extended to her territories.

Germany was the one great power to be transformed and yet to escape disintegration. Her territorial losses were, with the exception of the creation  
 GERMANY  
 TRANSFORMED of a "Polish corridor" between East and  
 WITHOUT DIS- West Prussia, all on her periphery or out-  
 INTEGRATION side Europe, and the wounds they left were capable of healing if they were not rubbed. She suffered no major amputations comparable to those of Russia, and escaped the ruthless dissection that befel Austria-Hungary. She did not lose one-tenth of her population and what was left was almost exclusively German in race and language, for it was mainly her alien fringe that was shorn off — Alsace, Lorraine, Eupen, Malmedy, parts of Schleswig and Silesia, Prussian Poland, and Memel. Only Danzig and the Saar possessed uncontrovertible German majorities, and the first was not handed over to an alien sovereignty but became a separate "Free State", while Germany's sovereignty over the latter was only alienated for fifteen years. No patriotic German, nurtured on the glories of the Hohenzollern-Bismarckian empire, could be expected to look with complacency on these

losses, but, nevertheless, they were less than other people's ; less, in proportion, even than Bulgaria's ; far less than Austria's or Hungary's or Russia's or Turkey's.

Germany lost her empire and deposed her dynasties. She changed from monarchy to republic in every state of the *Reich*, and from the legitimist to the libertarian form of government ; but she did not lose her federal unity, her civil service, her aristocracy of birth and wealth, the bulk of her material resources, or her pride. Political revolution was not accompanied by social revolution. Many elements of the old Germany had to be combined with new forces in the reconstruction of the German state as a democratic republic, but from the first (or at least, from the taking charge of the revolution by the compromising and compromised majority socialists of Ebert, which happened before the end of 1918) no digging up of foundations was either attempted or desired by those who found themselves in power in the German republican *Reich*. The Hohenzollern-Bismarckian empire was in ruins, but the German people had retained possession of the site ; though the roof had fallen in, the walls were substantially undamaged, and much of what was inside had been salvaged. The Weimar republic, which was given definitive constitutional form on August 11, 1919, provided a new roof for the German *Reich*, but it did not undertake its rebuilding. Latterly the Weimar republic has come in for much retrospective criticism, and, indeed, it possessed many defects, but it did act as a roof over Germany's head for nearly fourteen years, through the period of her deepest humiliation since 1806-13 (though it thereby became associated in the minds of the German people with the Versailles *Diktat* and its war-guilt clause, with reparations, with the Ruhr occupation, and with the great inflation, for none of which it was responsible).

EMPIRE  
LOST AND  
DYNASTIES  
DEPOSED

SOCIAL  
REVOLUTION  
AVOIDED

It is easy to criticize the Weimar constitution, but it is impossible not to recognize it as one of the most interesting constitutional documents ever drawn up. Into it was distilled the essence of the expressionist state, drawn from every libertarian source that could be found. Its inspiration was undoubtedly the abortive Frankfurt constitution of 1849, to which its resemblance in places is striking, but its framers took full advantage of the various developments in libertarian government since 1849, in producing a "democracy ingenious and logical, and based upon the study of the political pathology in other countries". There is in the Weimar constitution something of everything in the *répertoire* of the expressionist state, for Germany, having failed to secure libertarian institutions in 1849 and again in 1867 and 1871, was determined in 1919 more than to make up the lost ground, and to become the most democratic democracy in the world. "The Germans", pointed out Headlam-Morley in 1928, "have made use of all the devices new and old by which a democracy can express itself, and have sought at the same time to find room for the application of new theories. Cabinet government has been borrowed from England, the idea of a strong popular president from America, direct legislation from Switzerland. The President and the *Reichstag* are to occupy a position of equal importance; both are representative of the sovereign people, each is to act as a counterpoise to the other; in cases of dispute the decision rests with the people. A referendum can be brought about by the decision of the President, or of a minority in the *Reichstag*, or on the demand of a section of the people themselves. The complication does not end here. The *Reichstag* is the chief legislative authority, but it is not the only representative assembly; a *Reichsrat* or second chamber has been established to represent the interests of the member-states and to serve as a check on the actions of the *Reichstag*, and an

WEIMAR  
CONSTITUTION  
THE ESSENCE  
OF THE  
EXPRESSIONIST  
STATE

Economic Council to give expression to the needs of the industrial life of the nation."

The constitution was adopted by a national assembly elected on a basis of universal suffrage, both men and women voting at the age of twenty, and this constituent assembly also acted as the first regular *Reichstag* of the German republic after the promulgation of the constitution in August 1919. Subsequently, the *Reichstag* was to be elected on the same basis (article 22), with proportional representation and *scrutin de liste*, the country being divided into thirty-five electoral districts, each returning a member to the *Reichstag* for every 60,000 of its voters. In each district a series of party lists instead of

FRANCHISE  
AND  
ELECTORAL  
SYSTEM

individual candidates were to be voted for, and candidates were to be declared elected in the order that their names stood on their respective lists. A special *Reichslist* was permitted to each party, on which party leaders and other favoured persons could be placed, and the sum of the odd votes over in the various constituencies was credited to each *Reichslist*. By this means very few votes were wasted, for if a party could collect even 30,000 votes throughout the whole *Reich*, it was assured of at least one representative being elected from its *Reichslist*. This striving after perfect democratic equality (not only one man one vote and one women one vote, but also for every 30,000 votes for a given party at least one representative in the *Reichstag*), was most painstakingly carried out. The President was to be elected by the whole

STRIVING  
AFTER  
PERFECT  
DEMOCRATIC  
EQUALITY

people in one national constituency by the same wide franchise, and if no presidential candidate obtained more than half the votes cast, a second ballot was to be held with all but the two leading candidates on first ballot eliminated. Candidates for the *Reichstag* had to be at least twenty-five years old, and for the presidency at least thirty-five. There were no other restrictions. By

the side of the German electoral system of 1919, the French with its exclusion of women, and the British (even today) with its double voting, its single-member constituencies and its residential qualification, appear, from the democratic point of view, positively antediluvian. Thirty-seven million Germans, or 60 per cent of the entire population, were qualified as voters in 1919.

The sovereignty of the people was proclaimed in the preamble to the Weimar constitution, and article 1 declared "The German *Reich* is a Republic. The political power emanates from the people". Germany became what few of the older libertarian states, but most of the new ones had become—a double democracy. Her representative democracy was logical and complete, and she also adopted devices of direct democracy including the popular referendum and initiative, though in providing machinery for the direct action of the people, she went by no means so far as Switzerland and certain other states. The Frankfurt constitution had been framed before the machinery of direct democracy had been far developed for the use of modern states with large populations, and here, as in several other places, Weimar tended to hide behind the black, red and gold banner of 1849 (which was adopted as the national flag of the Weimar republic). After all, not one of the other great powers had adopted the popular referendum, the initiative in legislation or the recall of officials, on a national scale up to 1919 (indeed they have still not done so) and Germany, too, contented herself with completing her representative democracy, but making only a gesture (the popular referendum and initiative in certain circumstances) in the direction of direct democracy.

The lower house of the national legislature, the *Reichstag*, elected for four years in the manner described, became, for the first time in German constitutional history, the pivot of the state. The President could dissolve

A DOUBLE  
DEMOCRACY

it on his own initiative, but was not permitted to dissolve it for a second time if the succeeding election result supported its view on the issue between them against his (article 25). The *Reichstag* could convoke itself and was required to meet at least once each year; its proceedings were to be public (unless a two-thirds majority resolved otherwise for any specific occasion), and the press was entirely free to report them; the immunity granted to members (which had been incomplete under the empire) was most comprehensive (articles 36-38). The upper house, or *Reichsrat* (composed, as had been the old *Bundesrat*, of representatives of the governments of the member-states) was definitely a subordinate body and its part in legislation was little more than subsidiary. Only the President represented a potential popular force in the state in any way capable of challenging or checking the will of the *Reichstag*.

REICHSTAG  
THE PIVOT  
OF THE STATE

The German President was to be directly elected by the whole people for a period of seven years, but his every act as President had to be countersigned by a minister responsible to the *Reichstag*, for the principle of parliamentary responsibility, already accepted by the government during the last days of the Hohenzollern empire, was deliberately chosen by the framers of the Weimar constitution after they had examined the alternative American system of "presidential government", with a non-parliamentary ministry responsible only to the President. This parliamentary system, which worked by usage and conventional acceptance in countries such as Britain and France, was carefully written into the German constitution of 1919 as a legal reality (articles 53, 54 and 56), and crystallized therein to a greater extent than it had ever been before. There was no attempt, therefore, to achieve separation between the executive and the legislative organs of the state. The

SYSTEMATIZED  
PARLIA-  
MENTARY  
GOVERNMENT

*Reichstag*, for instance, retained the power to declare war and conclude peace, a prerogative jealously guarded by the executive under the Hohenzollern-Bismarckian system. When the President desired a dissolution or a referendum, he had to secure the ministerial counter-signature for this as for every other act, while the *Reichstag* by a two-thirds majority could submit to the people a proposal to remove the President from his office (though rejection by the people of such a proposal involved an automatic dissolution and the confirmation of the President in his office for a further seven years). The President, the Prime Minister (for whom the title *Reichskanzler* was still retained) and the other ministers could be impeached at the initiative of the *Reichstag*. The President was left a suspensive veto over legislation in that he could submit any bill passed by the legislature to a popular referendum before signing it, and the people (represented by not less than one-tenth of the total electorate) could initiate legislative proposals, which, if not accepted by the legislature and the President, were also to be submitted to popular referendum. One thing, and one only, was left to the President to do entirely on his own, and that was to summon anyone he chose to be *Reichskanzler* and to form a government, and it was through this tiny loophole in the Weimar constitution that Adolf Hitler was enabled to march to power by entirely constitutional means in 1933, though once inside he was to blow the whole system skyhigh. .

Germany thus became in 1919 a republic, an entirely democratic and an almost completely expressionist state, but she did not become a unitary state, as the extreme radicals of 1848 had desired, and as a vociferous minority had desired ever since. Weimar rejected the logic of a unitary solution, just as had Frankfurt and Bismarck. Germany was to have a further decade and a half of the richly diversified *Kleinstaaterei* that she had enjoyed

GERMANY  
REMAINS A  
FEDERAL  
STATE

through the ages, though the separate states cannot be considered to have retained more than a few shreds of their former sovereignty after 1919. The usual unprofitable argument that arose in and after 1849 and 1867 concerning whether Germany really would remain a *Bundesstaat* under the new constitution, or whether she would be to all intents and purposes an *Einheitsstaat*, does not merit much attention, but it may be noticed that though the German states were after 1919 called merely *Länder* (they had lost their dynasties in 1918), it should also be remembered that *Land* may be translated as "country" as well as "territory", and that a great deal of *Landesgefühl* as well as a great many particularist institutions remained. The Weimar republic, for instance, had a Ministry of Culture, but each separate *Land* had its own Minister of Education. The educational system was administered through these different local Ministries of Education. A foreign student who wished to matriculate at the university of Heidelberg or Freiburg had to send his *Gesuch* to Karlsruhe, the capital of Baden, not to Berlin; if he were at Tübingen it had to go to Stuttgart, and so on. But despite these gaps in the completion of administrative unification in the Weimar republic, a much greater degree of uniformity was introduced throughout the *Reich*. Not only were the *Reservatrechte* of Bavaria, Württemberg and Baden abolished, but Prussia was demoted from her position of predominance. Hugo Preuss, the chief drafter of the Weimar constitution, had desired to partition Prussia (and hence an unkind critic has called his name "ein Treppenwitz der Weltgeschichte"), but though this did not take place, her hegemony was completely abolished. In the *Reichsrat* it was declared that no one *Land* could have more than two-fifths of the total number of votes, whatever its size, while Prussia had her various provinces (including Berlin) directly represented, and they sent thirteen of her twenty-six members to the *Reichsrat*

PRUSSIA LOSES  
HER CON-  
STITUTIONAL  
PREDOMIN-  
ANCE



in this way, instead of the central Prussian government controlling the appointment of them all. In the *Reichsrat* each *Land* was given at least one vote, seven small central German states having voluntarily combined to form the new territory of Thuringia, but the importance of the *Reichsrat* was very much less than that of the old *Bundesrat* and it had only a suspensive veto over legislation desired by the *Reichstag*. As the President's veto was only suspensive also (under the empire both emperor and *Bundesrat* had to approve of every bill before it could become law), the will of the *Reichstag* (if not found by general election or referendum to be counter to the will of the people) could always be made to prevail in the long run.

The sphere of the central government was redefined, and was made much broader than in 1867, though residual powers still remained with the *Länder*. The competence of the *Reich* was to be exclusive with regard to foreign relations, nationality laws, the regulation of emigration, the national forces, the coinage, customs and tariffs, commercial regulations, posts and telegraphs, and the *Reich* had the option of operating ultimately in a much wider sphere, though until it chose to do so the *Länder* remained competent therein. A blanket clause provided that anything necessary for the welfare of the German people could be the subject of uniform *Reich* legislation, and *Reich* law was declared to be supreme and to prevail over territorial law, the Supreme Court of the country deciding in disputed cases. All this is very reminiscent of the United States constitution, but the spirit of the Weimar constitution with regard to the relative position of central and state governments is rather that of the United States' constitution as redefined and reinterpreted in a unitary direction after the civil war, than the United States' constitution as promulgated in 1787, with its strictly divided sovereignty, and, indeed, goes beyond the United States (apart from

WIDENED COM-  
PETENCE OF  
THE "REICH"

the temporary phase of extreme reconstruction in parts of the South) in providing for *Reich* supervision over the territorial administrations, with a supreme court of administration to deal with disputes in this field.

The Weimar constitution is divided into two main parts. Part I deals with the structure and organs of the state (its seven sections dealing respectively with *Reich* and *Länder*, *Reichstag*, President and ministry, *Reichsrat*, federal legislation, federal government and federal judiciary) and extends up to article 108; part II is devoted to fundamental rights and duties of

Germans, and takes up 57 of the remaining 73 articles. Based upon the monumental section VI of the Frankfurt constitution of 1849, which consisted of 59 short articles, the Weimar declaration of rights and duties is far more comprehensive, indeed, more comprehensive than any other such declaration. It covers virtually everything that could be thought of, its five sections dealing with the Individual, the Community, Religion and Churches, Education and Schools, and Economic Life. The first four of these sections represent a codification of selected parts of all previous declarations of rights and duties and of related legislation, and make fresh contributions only in new phraseology and in a few details, but section V, headed "Das Wirtschaftsleben", containing fifteen articles (151-165), several of them very long, breaks new ground.

FUNDAMENTAL  
RIGHTS AND  
DUTIES OF  
GERMANS

It had long been felt that the libertarian organization of the expressionist state, which had conferred the reality of political democracy upon the people of a number of countries by the beginning of the twentieth century, was incomplete through being strictly political in scope. A spate of social legislation around the turn of the century (pioneered by Germany herself, though she was then politically by no means a fully expressionist state) had helped to fill part of this gap, but some complementary organization in the economic sphere that would give

greater meaning and value for the ordinary citizen to the political democracy he had been accorded with so great a fanfare, was still needed by the libertarian constitutional systems. To give the vote to the landless peasant, to the sweated labourer, to the underpaid artisan, to the worker with black coat and white collar but no capital, to the dependent professional and official classes, without making it possible for them to use it in obtaining at least reasonable security of employment, a reasonable standard of living, and a reasonable enjoyment of the fruits of the land, of their labours and of civilization, was an empty mockery. Germany had stood upon the brink of adopting, like Russia, the Marxist solution to this problem, which involved first a complete pulverization of the instruments and institutions of political democracy (for, said Lenin, "the state is a machine for the suppression of one class by another") and then the reconstruction of society from the foundations up as a dictatorship of the proletariat, dedicated to the interests of these "labouring and exploited masses". The mild-mannered Ebert Social Democrats, suitably shocked by their sight of the abyss, quickly drew Germany away from this extreme, and their attempt to guarantee economic rights and to provide machinery in the economic sphere that would make their new state economically as well as politically expressionist, was their way of constructing a safe path around it and of throwing a bridge across it. But the fact that the organization of economic life in the Weimar constitution was opportunist as well as ideological must not detract from the interest and value of section five of part II.

THE ORGANIZA-  
TION OF  
ECONOMIC  
LIFE IN THE  
STATE

The keynote to this section is struck by its first paragraph, which states "The organization of economic life must conform to the principles of justice to the end that all may be guaranteed a decent standard of living (*mit dem Ziele der Gewährleistung eines menschenwürdigen*

*Daseins für alle*). Within these limits the economic liberty of the individual shall be assured" (article 151). Article 152 establishes the principle of freedom of contract, and prohibits usury (*Wucher*) and legal transactions which are contrary to public policy; article 153 guarantees the right of property, but legal expropriation of private property can take place without compensation in given circumstances; article 154 guarantees the right of inheritance in accordance with the provisions of the civil code; article 155 provides for the control by the state of the distribution and use of the soil, abolishes entail, declares the unearned increment on land values belongs to the community as a whole, and provides for the transfer of private royalties to the state; article 156 provides for the possibility of the transfer to public ownership of private enterprises, or of their organization and combination at the initiative of the government; article 157 places labour under the special protection of the *Reich*, and article 158 expressly includes intellectual labour and its productions within this protection; article 159 guarantees the right of association; article 160 states the right of employed persons to free time for the exercise of their civil rights and to fill honorary public offices; article 161 provides that the *Reich* shall establish, "with the controlling participation of the insured", a comprehensive scheme of social insurance; article 162 is worthy of full quotation. It says, "The *Reich* shall endeavour to secure international regulation of the legal status of workers to the end that the entire working-class of the world may enjoy a universal minimum of social rights"; article 163 proclaims both the right and the duty to work for every German, and "In so far as a suitable occupation cannot be found for him, provision shall be made for his necessary maintenance"; article 164 provides for the protection of "the independent middle-class in agriculture, industry

"A DECENT  
STANDARD  
OF LIVING"

"A UNIVERSAL  
MINIMUM  
OF SOCIAL  
RIGHTS"

and commerce"; article 165 provides for the establishment of workers' and employers' councils and for a federal economic council.

Though these councils have been called the single new political idea of the German revolution of 1918-19, whereas all else derived from 1848 or 1789, and though they were only included with reluctance as a conciliatory gesture toward the leaders of the workers' and soldiers' councils who had led the revolution and then had somewhat unexpectedly resigned their power into the hands of the constituent national assembly, the Federal Economic Council at least appears to have had some historical connection with Bismarck's unsuccessful efforts to set up an advisory economic council for the *Reich*, and with the economic council he actually did set up in Prussia in the eighteen eighties, though of course the immediate stimulus (both by example and revulsion) came from the new development of the council idea under the Bolsheviki in Russia since 1917. According to article 165,

WORKERS' AND  
EMPLOYERS'  
COUNCILS

workers, salaried employees and employers were to co-operate on an equal plane to regulate wages and conditions; workers' councils were to be organized in individual plants and in larger districts, with a Federal Workers' Council for the whole *Reich*, and were to join with the employers' representatives and those of "other interested population groups" to form the district economic councils and the Federal Economic Council. All important economic groups were to be represented in these economic councils proportionately to their economic and social importance; all important social and economic legislative proposals of the government were to be submitted to the Federal Economic Council for its views before going to the *Reichstag* and *Reichsrat*, and the council could also draft such bills and place them before the legislature with or without the approval of the government. But though the legislature was bound to consider the views and proposals of the

Federal Economic Council, it was not required to adopt them. The Council had only advisory powers, and its existence did not therefore challenge the politically constituted assembly in any way, or detract from the dominating position of the *Reichstag* in the Weimar republic. Nevertheless, though the council system thus tentatively set up in Germany in 1919 failed to realize what some people expected of it, and in its working gave some support to the claim that the whole device was a sop to Cerberus aimed only to distract the attention of the German workers from the seductive advances of the Russian soviet system, it had in it elements of the "Parliament of Industry" advocated (as by the Webbs in Britain) but not even tentatively adopted elsewhere in or before the immediate post-war period, and it had in it more than the germs of certain of the most potent and highly publicized machinery of the corporative state that was first to develop in Italy a few years later and then to find acceptance elsewhere, not the least in the German Third *Reich* which succeeded the Weimar republic. But when ideas have crossed the Alps at least twice, and perhaps received some wind-blown additions from the Urals as well, their resemblance to their original form may easily be unrecognizable, and can even more easily pass unrecognized.

Just as the Weimar constitution must inevitably be compared with the structure of the *régime* that has succeeded it in Germany, so can it with profit be compared also with the forms of government devised for Germany in 1849 and 1871. In the fundamental matter of the relationship between the separate states and the *Reich*, the Frankfurt constitution, with its unequivocal federalism, stands between the strong unitary tendencies of 1919 and the concessions to particularist feeling and the *Reservatrechte* of 1871. In 1919 the national constituent assembly was

THE FEDERAL  
ECONOMIC  
COUNCIL

COMPARISON  
OF 1919 WITH  
1849 AND 1871

called together and completed its deliberations without any formal reference to the separate states (though informally their views were frequently sought during the framing of the constitution), and under the Weimar constitution the *Staaten* became *Länder* whose boundaries could be changed without their own consent (article 18), whose form of government was required to be republican (article 17) and whose internal affairs could be regulated to any extent by *Reich* legislation in the interests of the general welfare of the German people (article 9). Thus "The *Reich* which Bismarck forged was a federal union of hitherto sovereign states; the new *Reich* was the political organization of a single people, subsidiarily divided into largely autonomous political units to which the name state might or might not be given". As the Frankfurt constitution never went into force, the process of historical evolution can be seen to have developed gradually from the four hundred virtually unrelated sovereignties of 1648, through the Napoleonic rationalization, the league of thirty-nine sovereign states of 1815, the federal unions of North Germany and of the Hohenzollern Empire of Lesser Germany of 1867 and 1871, the more unitary federation of *Länder* in the republican state of 1919, to the *de facto* unitary Third *Reich* of 1933 and the completely and legally unitary Greater Germany of 1938. The Third *Reich* and the new Greater Germany owe more to Weimar than they will or can ever acknowledge, but Weimar handsomely acknowledged its debt to Frankfurt. They differed in that one was the product of an age of *laissez faire* individualism and the other of a period of collectivism, but they are bound together through their preoccupation with giving the fullest meaning and scope that existing political machinery and ingenuity provided, to the sovereignty of the people and the most complete protection of the basic rights of the citizen. In the history of democracy, what was achieved under the black, red and gold banner of 1849

and 1919 must always occupy a place of great significance, even though that banner has twice been trampled in the dust.

It has been claimed that the Weimar constitution was entirely unsuited to the needs of Germany in 1919 and to the temperament of the German people at any time, and whatever its merits as an ultra-democratic and super-libertarian constitution *per se*, it must be conceded that this claim is not entirely lacking in validity. It may be going too far to say that Weimar merely copied the errors of Frankfurt and added others; that it broke the traditional organic connection between the German *Reich* and its several parts; that it released Prussia from her identity for most purposes with the *Reich* that had been Bismarck's greatest work, and made the Prussian prime minister (who acted also as the head of his presidentless state) more powerful than the federal Chancellor (who had to be appointed by a popularly elected federal President); that this federal President was only a sort of *Kaiserersatz* or substitute-for-an-emperor, and performed the functions of a mere writing machine; that the parliamentary system of government was introduced without the party political background essential for its successful operation existing in advance; that fundamental rights were out of date and parliamentarism already under a cloud by 1919; and that "it is a wonder that the Weimar constitution lasted fourteen years"; but, even if such latter-day criticisms are thought to be unjust and extreme, it must at least be conceded that Germany could hardly have chosen a more difficult time for a radical experiment in pure democracy than the years between 1919 and 1933.

INQUEST ON  
THE WEIMAR  
CONSTITUTION



## CHAPTER XXV

### THE BECOMING OF "NATIONS YET TO BE"

It cannot be doubted that when Sir John Seeley discussed "the Expansion of England" in the year 1883, and looked for the future of the British empire less "within the narrow confines of the mother country" than "in the destinies of nations yet to be", he envisaged a far greater increase in population and development in these nations yet to be than the last fifty years have produced. By analogy with Britain's own development, and the even more phenomenal advances of Germany and the United States, in the half century before he wrote, the future must have seemed very much in the hands of such lands as Canada (recently and successfully federated), Australia (whose states were beginning to feel their way toward a similar federation) and other though less extensive dominions, such as New Zealand and Newfoundland, that had been colonized by British settlers and had adopted the institutions of the mother country. The surprise of Sir John Seeley (he died in 1895) would indeed have been great if he could have learned that by the year 1938 the combined populations of the self-governing dominions of the British Commonwealth of Nations did not exceed thirty million people (even including with Canada, Australia and New Zealand, the new dominion of Southern Rhodesia, the demoted dominion of Newfoundland, the uncertain dominion of Eire, and all the African, Indian, Afrikaner and British inhabitants of the Union of South Africa), whereas that of England, Scotland, Wales and Northern Ireland, despite a very considerable slowing up in the rate of increase, was over forty-six million, and that of Greater London alone more than the whole of

Australia's, more than the whole of South Africa's and very nearly equal to Canada's ten million. But the criterion for the interest of a constitutional system cannot, of course, be population alone, otherwise the London County Council would receive more attention than the government of the Commonwealth of Australia, and Nigeria with its twenty million people twice as much as Canada, while the U.S.S.R., India and China between them would fill half this volume. Though the rate of development of Canada and Australia, New Zealand and South Africa, in population and all that the rapid filling of empty spaces can bring, may have disappointed those who expected phenomenal growth, their constitutional development has brought no corresponding disappointment to the student of government, and these British dominions, though more particularly the first three, have provided, up to the present, the most promising examples in the whole world of the transplantation of specific libertarian institutions from their original habitat to a new and distant environment. Admittedly with the soil better prepared and the political climate more suitable, they have taken root far more strongly and with far less distortion than did the adoption of these same institutions in Latin America early in the nineteenth century and in parts of central and eastern Europe early in the twentieth. The constitutional history of the British dominions alone comes near to approaching the record of the United States of America, where a constitutional system designed for four million people living mainly in thirteen states on the Atlantic seaboard, was stretched without breaking (though not without a certain amount of bending) right across a continent to apply to a hundred and thirty million people in forty-eight states, and then beyond the seas to territories as scattered as Alaska, Hawaii and Puerto Rico, and, potentially, further still to the Commonwealth of the Philippines.

DEVELOPMENT  
IN POPULA-  
TION AND  
GOVERNMENT

The two major constitutional trends characteristic of the British imperial system as a whole have been the evolution of status of the individual colonies from complete military dependency to completely self-governing nationhood, and the forging of links of voluntary association to counteract the disintegrating consequences of the first process; and these, while they cannot be examined here in detail, have exerted continuous influence (the first, ever since the loss of the thirteen American colonies preceded a revision of colonial policy, and the second, ever since the effects of this revision began to be felt in the early eighteen seventies) upon the separate constitutional system of the various dominions of the British crown. The purely military dependency (such as are Gibraltar and Hong Kong today) and the crown colony with some degree of representative but none of responsible government (as are Jamaica and Bermuda today), examples of which make up the vast majority of British territories, must also be neglected, and attention must be reserved for the few regions which have reached the stage of becoming self-governing dominions (with parliamentary systems of government and ministries fully responsible to the people's representatives, such as is Southern Rhodesia today), and those which have reached the further stage of virtually independent nationhood (autonomous communities owing allegiance to the British crown, but admitting no reserved powers, recognizing no authority in the British Parliament and having an international existence and entity separate from that of the mother country, such as are Canada, Australia, New Zealand and South Africa today). Naturally the divisions between these four classes are not clear cut; there are gradations from military dependencies (where the governor has as much and as complete authority under the crown as a captain has over his ship while at sea) to

TWO MAJOR  
CONSTITU-  
TIONAL  
TRENDS

FOUR  
GOVERN-  
MENTAL  
TYPES

crown colonies; through the various types of crown colony, including those which (like Ceylon) hover on the edge of being self-governing dominions, to dominion proper, and even beyond these, through those virtually independent nations which (like New Zealand) do not exercise their right to send diplomatic representatives to foreign countries and those (like Canada) which do, to Eire (who stands with one leg in and one leg out of the British system and herself manages to pull both of them at one and the same time, so that to what extent she is in and to what extent she is out at any given moment it is difficult to say — which suits all concerned).

Though every stage and every variety of intermediate position can be discovered, it was until quite recently believed that the whole system was evolving slowly but steadily from one stage to another, and that even where the possibility of any material advance in the direction of self-government and autonomous nationality was precluded by special considerations, retrogression was impossible, especially at the more advanced stages. The evolutionary principle at work in the British imperial system with a group of fully ex-

THE EVOLU-  
TIONARY  
PRINCIPLE  
AT WORK

pressionist states, linked together simply by community of interest and a formal connection through the crown, as the goal, was indeed the pride of those who sought to square the libertarian ideal with the realities of empire, but this optimism (already shaken by the failure of experiments in semi-autonomy in Malta and Ceylon and the bad reception of dyarchy in India) was cruelly undermined in 1933, when the island of Newfoundland, "England's oldest colony" (whose quarter million inhabitants were of British extraction, and whose claim to the huge territory of Labrador as against Canada's had recently been allowed by the Judicial Committee of the British Privy Council), was bereft by act of Parliament of her dominion status, of her responsible government and even of her representative institutions,

after a Royal Commission had uncovered in Newfoundland "a process of deterioration which has reached almost unbelievable extremes" and had recommended that the rule of the island should be placed entirely in the hands of the Governor and an appointed commission until the appalling political and economic state of affairs found there should have ceased to exist. The proud process which had started with Pitt's Canada Act of 1791, had culminated in the Statute of Westminster of 1931, and had been punctuated by a series of momentous state papers, from the Durham Report of 1839 to the Simon Report of 1930, came to a startling anti-climax in the court-martial severity of the Amulree Report of 1933,

RETROGRES-  
SION IN NEW-  
FOUNDLAND

and the reduction to the ranks implemented by the Newfoundland Act of the same year.

Though the Union of South Africa's use of the freedom of her present status in her treatment of her "native" and "coloured" citizens has also aroused some shaking of heads, the optimist of empire can still prefer to regard the case of Newfoundland as the exception which proves the rule, or (even more charitably) as the result of "the overwhelming difficulty of the challenge presented by nature and history, rather than the degeneration of political life". A Newfoundlander, gazing upon the ruins of the Statute of Westminster, might peevishly complain that his country had been made an example of, had been singled out thus to be the Poplar of the British Commonwealth, because, like Poplar, she had no powerful friends at court and was not in a position to make things uncomfortable for anybody but herself; he might even wonder aloud, if he dared, what Lord Amulree and his colleagues, equally untrammelled and unprejudiced, would have put into a report on the political and economic situation in the six counties of Northern Ireland in the year 1933.

Though an unfeeling alien has pictured "Seven little Commonwealths in an awful fix. A Royal Commission

looked at one — and then there were six", the catastrophic analogy with the ten little nigger boys is at least premature, and, constitutionally considered, Newfoundland (with the exception of the new dominion, Southern Rhodesia) was the least significant and complex of them all in its development. Newfoundland received representative institutions in 1832 and responsible government in 1855, and had progressed to self-governing dominion status, with full membership of the Imperial Conference, full participation in the advantages of the Statute of Westminster, but without separate membership of the League of Nations and without separate diplomatic representation in any foreign country, before the *débâcle* of 1933. With only a quarter of a million inhabitants, mostly confined to coastal settlements, Newfoundland adopted a strictly centralized form of government, with a small bicameral legislature, modelled in a simplified form upon that of England. She had resisted the opportunity to join the Canadian federation when and soon after it was formed, and more latterly Canada had resisted her entry, though as a Canadian province she might have had a happier fate and may still have a promising future. The exploitation of Labrador, to which Newfoundland has won the legal title without having the means to take advantage of it, may yet cause the missing constitutional bridge to be built between the first colony and the first dominion.

CONSTITU-  
TIONAL  
HISTORY OF  
NEWFOUND-  
LAND

Pitt's Canada Act of 1791, dividing the colony into two separate parts and giving representative government in the shape of an elected legislature to each, was doubly a fruit of the American revolution, for the loss of the thirteen colonies saw the beginnings of a new colonial policy, and the entry of thousands of United Empire Loyalists into Canada provided for the first time a large British element in what are now Ontario and the Maritime Provinces to supplement and to counterbalance the

French inhabitants of Quebec. Now the settlers, both French and British, had representative institutions for the first time (the French in Canada thus receiving a modern form of government at the very moment when France's own first modern form of government, the constitution of 1791, was going into force. To what extent Pitt and his advisers regarded the act of 1791 as calculated to reconcile the French in Canada to British rule, and to prevent them from yearning after that of revolutionary France, is a nice point). For almost half a century Canada was ruled as two crown colonies under the act of 1791, but unrest in both, culminating in the rebellions of 1837, produced Lord Durham's famous report, which is rightly regarded as the foundation stone of the libertarian commonwealth which Britain has been seeking to develop out of a selected part of her empire during the last hundred years. The Durham Report led to a reunion of the two colonies into one, and ultimately (under the governorship of Lord Elgin a decade later) to cabinet government with responsibility to the elected legislature.

The right of Canada to be the arbiter of her own domestic affairs was slowly won. In 1859 fiscal independence was secured, and Canada began to take the path of tariff protection just when Britain was firmly on the path of free trade. The reunion of 1840 had been in a way a retrograde step dictated by politics of empire rather than by regard for the best constitutional interests of Canada as a whole, and some form of federation was already overdue when the British North America Act of 1867 set up the federal Dominion of Canada, with Quebec, Ontario, and the maritime colonies (excluding Newfoundland, who negotiated with the others, but did not finally join with them) as its member-provinces, and the vast undeveloped western and northern lands as potential provinces. This first "dominion" constitution, itself part of the backwash of the American civil war and the

CANADA  
FROM PITT  
TO ELGIN

world crisis of federalism thereby engendered, and itself as profoundly influenced by American as by British constitutional developments, has since served as a model for both constitutional and political changes in other parts of the British empire, and to some extent elsewhere.

The act of 1867 has remained in force for over seventy years, and could now only be amended by Canada herself, and Canada has gradually clothed herself with nearly all

FEDERATION  
AND  
NATIONHOOD  
IN CANADA

the other attributes of complete internal and external sovereignty. She has had separate land and sea forces of her own since 1911; she was separately represented at the peace conference of 1919 and acquired individual membership of the League of Nations; she successfully established her right to influence the foreign policy of Britain or to pursue a separate foreign policy, as she chose when she refused to adhere to the Locarno pact; since 1925 she has sent diplomatic representatives abroad on her own account. Even without the Imperial Conference declaration of 1926, the repeal of the Colonial Laws Validity Act or the Statute of Westminster of 1931, her destinies are now entirely in her own hands.

Australia, of which settlement did not begin until nearly the end of the eighteenth century, had to wait until 1842 for representative government, when the colony of New South Wales received a partially elected legislature, but responsible government was secured in all the Australian colonies (the remainder had meanwhile been organized on the New South Wales model) before the end of the eighteen fifties, and they thenceforward controlled their own domestic affairs, though matters of imperial concern were "reserved". The Colonial Laws Validity Act of 1865, which restricted the application of British laws in the colonies to those specifically including them, gave these distant and isolated colonies in Australia even wider scope. A movement in the early eighteen eighties for the creation of some sort of federation of



the colonies of New South Wales, Victoria, Queensland, South Australia, and Tasmania (Western Australia also became a colony with its own responsible government in 1890) culminated after many difficulties had been overcome (the incentive and the danger from a near-by federal state of ever-increasing importance which had existed for Canada, did not affect Australia) in the Australian Commonwealth Act of 1900. A stronger particularist feeling than that which animated the different parts of Canada in 1867 made of the Australian federation a more loosely bound system, so loose that many subsequent attempts have been made (as yet unsuccessfully) to bind the Australian states more firmly together, but not loose enough for Western Australia, a majority of whose people have now declared in a popular referendum their desire to separate from the Commonwealth of Australia though not from the British Commonwealth. But Western Australia has found, as did the Southern states in the American civil war, that it is not easy to contract out of a federal state, and the lack of sympathy for her demands shown both by the Commonwealth of Australia and by Great Britain have so far thwarted this would-be piece of self-determination. But Australia's control, as a Commonwealth, of her own destiny, is as untrammelled as is Canada's, though as yet she has not chosen to have her own diplomatic representation or to enter into separate treaty arrangements. Her isolation, and her economic and population problems, have tended to make her a little (but only a little) less self-reliant than Canada.

New Zealand differs from both Australia and Canada not only in having taken the path of unification rather than of federation in government, but in having been less anxious to assume the attributes of virtually independent sovereignty. As early as 1852 her six widely separated settlements were each given elected councils

subordinate to one central New Zealand legislature. Herein lay the seeds of federalism, but New Zealand was relatively a small country, and the remoteness of the separate colonies from one another was so much less a factor in the situation by 1876, that the system of autonomous provinces was abolished in favour of a strictly unitary form of government, the provinces thenceforward being known as counties. New Zealand's great distance by sea from Australia ruled out the possibility of her becoming one of the member states of the Commonwealth in 1900, even had she shown any signs of thus sacrificing some of her individuality, and she has gone on alone to attain the status of a self-governing dominion with separate membership of the League of Nations, her million and a half people clinging so tenaciously to their British traditions that they have been called "more British than the British themselves".

CONSOLIDA-  
TION AND  
INDIVIDUAL-  
ISM IN NEW  
ZEALAND

South Africa's constitutional development has been more catastrophic and less clear-cut, and the result is somewhat different from that in the other three dominions. Cape Colony received responsible government in 1872 and Natal (which had become a separate colony in 1856) in 1893. Open hostility between these British colonies and the two independent Boer republics of the Orange River State and the Transvaal, into which Great Britain herself was increasingly drawn after the Jameson Raid of 1895, culminated in the South African War and the annexation of the two republics as crown colonies in 1902. The Liberal government which came into power in Britain in 1906 (some of its leading members had violently opposed the war) almost immediately implemented the setting up of responsible government in the Orange River Colony and the Transvaal, and once they were equal in status and similar in governmental form to Cape Colony and Natal, the advantages of all four coming together in one general government were so obvious that the Union of

South Africa was formed in 1909. The specific use of the word "union" instead of the more general "dominion" or "commonwealth" was significant, for the four colonies did merge their separate identities in the new union, to become provinces which, though they maintained all their old machinery for governing themselves, did not constitutionally retain sufficient powers to make of the Union a federal state. The four former colonies were large and, by British colonial standards, populous, so they could not be so completely merged in one central organization as had been the six provinces of New Zealand which had become counties, but they accepted a far smaller degree of autonomy within the Union than had the provinces of Canada in 1867, and an infinitely smaller degree than had the states of Australia in 1900.

In the Union of South Africa, the earlier antagonisms of British and Afrikaner settlers have latterly tended to be damped down in view of the far greater problems presented by the place in the constitutional system of the Union of the "coloured" (mainly immigrants from India) and native African population. The question of the representation of the natives, who so far have been allowed to vote only in the Cape Province, is undoubtedly South Africa's greatest constitutional hurdle for the future, and upon the manner of its solution depends not only her position in (or out of) the British Commonwealth, but her future as an expressionist state in the libertarian tradition — if she chooses to continue moulding her institutions in that shape. It must be remembered that the libertarian tradition is far less firmly entrenched by time, habit and environmental and ethnographical considerations in South Africa than in Canada, Australia and New Zealand, and any deviation from it would therefore not be so unexpected (though it is by no means to be expected) there as in the other three dominions

CONFLICT AND  
UNION IN  
SOUTH AFRICA

THE NATIVE  
PROBLEM IN  
SOUTH AFRICA

mentioned. Even the universal franchise (admittedly no longer the badge of a libertarian constitutional system) though of long standing in Canada, Australia and New Zealand, has not yet come in the Union of South Africa ; the vote for the House of Assembly and membership of both houses of the legislature is still rigorously restricted to persons of European or white extraction, and was not extended to women until 1930, while the property and income qualifications for voters in the Cape and Natal were not removed until 1931. None of the four senators or of the twelve members of the Native Representation Council to be directly elected by the native population under the Representation of Natives Act of 1936, can themselves be " native " or " coloured ". The Union of South Africa is thus to all intents and purposes (and there is plenty of intent) an expressionist state for persons of European or white extraction only, who constitute barely a quarter of the population of the Union.

The possession of an executive responsible to the legislature being the core of the whole autonomous system within the British Commonwealth, the central legislative bodies have tended to predominate in the constitutions given to or adopted by the autonomous colonies and dominions (though the sovereignty of the legislature has for obvious reasons never been asserted, even in the unitary dominions). But in the working of these constitutions the cabinet and particularly the Prime Minister has usually tended to call the tune, by analogy with, though not as yet to the same extent as in Great Britain. The " presidential " government of the United States was difficult to combine with the existence, as formal executive head, of a governor or governor general appointed by the crown (and actually selected by the British cabinet) and in the choice of whom the people (or their representatives) of the dominion concerned had until very recently no direct and very little indirect influence ; the " parliamentary " government of France

was theoretically far more possible ; but all the cards were stacked in favour of the development of the "ministerial government" in the dominions of the "ministerial" government of Great Britain, and even in the federated states of Canada and Australia, where the need for a more precise division of powers was essential, this division has been confined to the relationship between the central and state or provincial governments, and not extended (as in the United States) to the different parts of the central government. Canadian and Australian federalism differ greatly, and in many ways the Australian variety is very similar to the type developed by the United States of America, but the retention of responsible ministerial government in both, with the Governor General a mere constitutional figurehead (acting in the Dominion or Commonwealth only as the king would act in the United Kingdom) preserves the family likeness to the British prototype far more strikingly than deviation in individual features serves to obscure it.

In Canada residual powers are left to the Dominion government and not to the provinces, whereas Australia followed the United States in leaving them to the separate states. In consequence the problems produced by increasing complexity of government and by expanding social and economic needs have not been so acute as constitutional issues in Canada, for new activities to meet new situations could more easily be embarked upon by the central government. Nevertheless, a cry for a formal increase in the power of the central authority and a corresponding decrease in that of the provinces has long been heard in Canada, and still persists. The untrammelled administration of many social services entirely by the provincial authorities, though the Dominion exchequer may make substantial contributions toward the cost of such administration, or even pay for it completely, has

CANADIAN  
AND  
AUSTRALIAN  
FEDERALISM

aroused much criticism, as when a Dominion cabinet minister went so far as to conclude that "the essential task before us today is the restoration of unity", and the whole question of relations between the Dominion and the provinces is to be the subject of an enquiry by Royal Commission. Australian federation, of more recent creation and far looser, has been the centre of bitter controversy from its very first years of existence. The attempt to bring not only social administration but also the regulation of industry and commerce under the control of the Commonwealth government has been as vigorously and on the whole as successfully resisted as have been similar efforts in the United States of America. The Australian states stand in the unassailable position of retaining direct connection with Great Britain through their governors, who are still (unlike the Canadian provincial lieutenant governors, whose very title is a subordinate one) appointed by the crown in the United Kingdom. They are able to wave this unsevered umbilical cord in the face of the Commonwealth authority at Canberra, while at the same time they continue to imbibe sustenance for their particularism through it from a somewhat embarrassed parent, who (as the case of the attempted secession of Western Australia from the Commonwealth shows) has every reason for wishing to see the Australian federal authority strengthened instead of being weakened or reduced in its territorial scope. It is probable that only some major crisis, in the alleviation of which the United Kingdom would be either powerless or unwilling to intervene, could bring anything more than a most gradual strengthening of the federal bond in Australia. The economic difficulties of recent years have not proved sufficient incentive, and, indeed, have given some encouragement to particularist sentiment.

The general acceptance of bicameralism (except in the Australian state of Queensland and in most of the Canadian provinces) throughout the autonomous states of the

British Commonwealth has brought with it no desire to duplicate the British House of Lords, but in the federal dominions senates have been used, as in the United States, to give direct representation to the member-states or provinces, as separate entities. In Canada both houses give recognition to the federal principle in their systems of representation, but members of the lower house are elected for a term of years by the people, and members of the upper house are now nominated for life by the Governor General (on the advice of the Dominion government) to represent the different provinces roughly on a population basis, Quebec having a fixed number of members and Quebec and Ontario an equal and fixed number of senators in each legislature. Australia, while electing her central House of Representatives on a basis of population, prescribes a minimum of five members for each of the original states of the Commonwealth, and her Senate gives exactly equal representation to all the states, six senators being elected in each, on a staggered basis, for six-year terms (half the Senate retiring every three years, though a persistent deadlock between the two houses can lead to an entire dissolution of both). This popular election of the Senate gives it an authority in Australia which has enabled it to challenge the lower house, whereas the Canadian Senate, which is nominated (with the effective choice of new senators in the hands of party leaders) plays an entirely subordinate part. Because of its greater significance, the Australian Senate (which has often tended to be more radical in complexion than the other house) has been more vigorously attacked, and a unicameral system has been advocated in some quarters. Deadlocks between the two houses might have been more frequent in Australia if the constitution had not made such elaborate provision (such as double dissolution, joint session and popular referendum) for avoiding and breaking them. The Senate

SECOND  
CHAMBERS  
IN CANADA,  
AUSTRALIA  
AND NEW  
ZEALAND

in Australia has never acquired a prestige comparable to that of the United States Senate, but it is not likely to disappear while the particularism of the separate Australian states, of which it is one of the emblems, remains strong. New Zealand, too, has had second chamber trouble, though its upper house (the Legislative Council) has not been required to serve any federal purpose. Nomination by the Governor General for life was changed to nomination for seven years in 1892 and to election in 1914. More recently a new system of electing the upper house has been devised, with the country divided into four large constituencies and the principle of proportional representation applied. Here, as elsewhere, New Zealand has been most prolific in detailed constitutional experiment. She has, nevertheless, remained conservative concerning the general bases of her system, adopted in the latter half of the nineteenth century and closely modelled upon the political institutions of Great Britain; but recent economic legislation and social planning in New Zealand have shown it possible for radical social and economic changes to be made without formally disturbing the traditional structure of the political system.

The constitutional history of Ireland during the last hundred years has been as different as possible from the relatively smooth developments in Canada, Australia, New Zealand and even South Africa, yet the Irish Free State set up in 1921, with no reason whatsoever for seeing virtue in British governmental devices, bore close resemblance in constitutional structure to these dominions, and the constitution of Eire which succeeded the original Free State constitution on December 29, 1937, differs in details rather than in fundamentals from its predecessor. As Mr. De Valera himself declared in explaining his new constitutional proposals: "The relationship between the history of a people and its laws is natural and inevitable", and "Our people are a conservative people".

IRELAND  
STANDS APART



The unhappy history of Ireland's government, dragging on from the murky background of Poynings' law right through the repressions of the seventeenth and eighteenth centuries (lit up momentarily by the legislative independence of 1782-1800), the abortive home rule schemes of the nineteenth and the early twentieth centuries, the Easter rebellion of 1916 and the troubles of 1920 and 1921, found a term in the truce of exhaustion that was embodied in the Anglo-Irish treaty of 1921, after Ulster had accepted but southern Ireland had refused the Government of Ireland Act of 1920, which had partitioned Ireland into two separate colonies, each with its own autonomous and responsible government and each with its own separate but subordinate legislature. The treaty

ANGLO-IRISH  
TREATY OF  
1921

of 1921 accorded to the Irish Free State (which would have covered the whole island if Ulster had not chosen to contract out) the dominion status of Canada, and this already involved separate membership of the League of Nations and (less valued by the Irish) of the imperial conference. Within the limitations thus prescribed (and certain practical conditions connected principally with defence, land annuities and the national debt had to be taken into account) the Irish Free State was actually free to choose her own form of government. She set about doing so with a methodical examination of those of the world's

CONSTITUTION  
OF THE IRISH  
FREE STATE,  
1922

existing constitutions that might serve her as models, and produced in 1922 a unitary constitution with a bicameral legislature (both houses popularly elected, but the Senate to be chosen from a panel of persons drawn up by the legislature, or from former senators) and the definite establishment of the principle of the responsibility of ministers to the lower house of the legislature (*Dail Eireann*), of which ministers were permitted and indeed required to be members. The president of the council of ministers was to be nominated by the *Dail*

*Eireann*. Popular referendum (later deleted by constitutional amendment) could be resorted to at the request of either house in the event of disagreement, but if, this procedure were not invoked the Senate possessed only a suspensive veto over ordinary legislation and none at all over money bills. The consent of the crown, necessary for all laws, and given through the representative of the king in the Free State, would, it was understood, not be withheld (by analogy with Canada) from any bill that had fulfilled every other condition for its enactment. This constitution exhibited the tendency of other post-war constitutions to crystallize in definite verbal form the usages and conventions which had grown up without specific legal inclusion around earlier constitutions, and as a libertarian constitution aroused very great interest on this count. It can be called a democratic, but hardly an ultra-democratic constitution like the German of 1919; it was full of the well-tried expressionist machinery of the eighteenth and nineteenth centuries, but contained little of the new-fangled constitutionalism of the twentieth. Its framers were severely restricted by the terms of the treaty, by the refusal of Ulster to have anything to do with the Free State because it was separated from the United Kingdom and by the strong republican movement in southern Ireland that also refused to have anything to do with it, but because it was not entirely independent of the British empire and Commonwealth. It was remarkable in the circumstances that any constitution could be put into operation in the Free State, and even more remarkable that it could last for fifteen years. Before the coming into power of the *Fianna Fail* party in 1932 the articles providing for popular referendum and initiative had been eliminated from the constitution (in 1928), but from 1932 onwards the aspects of the constitution to which *Fianna Fail* had always objected were one by one

FUNDAMENTAL  
ALTERATIONS,  
1932-1936

attacked. The requirement regarding the oath of allegiance was removed by constitutional amendment in 1933 (amendment being possible by ordinary legislative enactment at any time, following the removal of the machinery for popular referendum in 1928); the Senate was abolished by another amendment in 1936, and the opportunity provided at the end of the same year by the abdication of King Edward VIII was used to pass laws eliminating the British crown and its representative entirely from the constitutional system of the Irish Free State, except for certain specified and temporary purposes connected with her membership of the British Commonwealth of Nations. The jurisdiction of the Judicial Committee of the Privy Council had meanwhile been repudiated, and in 1937 no representative was sent to the imperial conference in London. The constitution of 1922 had thus become by 1937 merely the shell of its former self, so a new draft constitution was presented to the *Dail* by the government, and after its acceptance with minor amendments by that body, was submitted to the people, a general election being held at the same time. The new constitution received a substantial majority of popular votes and came into force at the end of 1937. It puts

CONSTITUTION  
OF EIRE, 1937

into more logical form the constitutional system that had already developed by the end of 1936, its principal innovations being to change the name of Saorstát Eireann (the Irish Free State) to Eire (Ireland), to assume (and to make specific provision for) the eventual inclusion of the six counties of Northern Ireland in the new system, and to return to a bicameral legislature. A President was to be elected for seven years to act as formal head of the state (to replace the representative of the British crown, whose position had become entirely anomalous through the developments of 1932-36), but his individual powers were to be purely nominal. No tendency was shown to set up "presidential" government, least of all the ultra-presi-

dential form developed recently in Poland and elsewhere, and the choice as President of a distinguished literary figure, instead of a politician, has underlined this decision. The *Dail Eireann* remained the king-pin of the constitutional system; it still nominated the Prime Minister; ministers still remained strictly responsible to it and dependent upon the support of its majority; the new Senate would not be in a position to challenge the *Dail*. The Senate was now to include a proportion of nominated members, chosen by the Prime Minister, though the majority were still to be popularly elected, but from different panels representing educational, agricultural, labour, industrial and public administrative interests respectively. Bills believed by the Senate or the President to be contrary to the provisions of the constitution could be referred to the Supreme Court for its opinion, while machinery for referring bills to popular referendum was restored to the constitution. A much more elaborate enumeration of fundamental rights replaced the somewhat sketchy opening articles of the earlier constitution, “the family”, “education”, “religion” and “private property” being covered with special thoroughness. The constitution was to be amended only by the procedure of acceptance of the proposed amendment by the legislature and afterwards by the people in a referendum. The family likeness to the other leading constitutions of the British commonwealth is thus still preserved to a certain extent in Eire, even though she has stepped outside the family circle.



## PART IX

### AFFIRMATIVE CONSTITUTIONS— THE CATEGORICAL STATE

## *Affirmative Constitutions — The Categorical State*

*The impetus of the French Revolution, emphasized by the consequences of the American Revolution, made of the democratic interpretation of government the leading influence in moulding the constitutions of the world. The libertarian tradition, dating back many centuries in certain countries, but driven underground almost everywhere in the sixteenth and seventeenth centuries, revived under this democratic stimulus to produce the expressionist state as the supreme political achievement of the eighteenth and nineteenth centuries, a form of government made of, for and by the people as a whole to an extent never before achieved.*

*The reconstruction of the map and of many of the constitutions of the world after 1918 doubled the number of truly expressionist states. Disregarding the failure of democratic institutions in the countries of Latin America lacking a libertarian tradition, most of the oppressed and submerged peoples of central and eastern Europe adopted ultra-democratic constitutions as symbols of their liberation. But, ominously for the future of democracy as an all-conquering force, it was in this hour of triumph rejected by the very country, Russia, where for decades it had been regarded as most urgently needed, and whose reception of it might have given some reality to the idea of a world safe for democracy. Russia received instead a form of government with an economic and not a political basis, and its organization pointed to the leading defect, from the point of view of the people it purported to make sovereign, of the democratic state — it had come to treat the vote as an end and not as a means, and while protecting its inhabitant in his person, his conscience and his property, against arbitrary treatment, it did not match his rights as a citizen by corresponding rights as a producer and as a consumer. Man had been recognized as a political but not as an economic animal. With very few exceptions his organizations on a producer or consumer basis stood outside, and often against, that of the state.*

*With the violence of all great movements that have been too long pent up, the Russian Revolution rushed to the other extreme and outlawed the state in the interests of those forces it had itself*

outlawed. All its proselytizing zeal caused only a temporary or partial outlawing of the state in its traditional form outside the Union of Soviet Republics into which Russia had been transformed, but the Russian example did produce two strong reactions in favour of a rehabilitation of the state as the force it was believed once to have been before the principle of national sovereignty had sapped its vigour and vitality. The state and the nation had gradually become coterminous as the nation-state, but the nation, in every sense, was made to come first in the combination, and the nation, in the expressionist state at least, meant the majority of its adult inhabitants expressing their will through democratic machinery. In Russia, there was after the revolution an agglomeration of nations, but no state; and these nations and these peoples were invited to seek expression through machinery outside the previous experience of the state.

"The state is not enough, therefore destroy and ignore it" was one permissible attitude, but another was to expand and strengthen it. The former was the soviet way and the latter the fascist. In 1919 Italy, whose political realization as such a half century earlier had been more than completed by new territorial gains, continued to feel herself thwarted as a nation-state, and particularly as a state which had assumed all the trappings of democracy without, apparently, reaping many of its advantages. With all that flamboyance which distinguished the Italian from the Northern Renaissance four or five hundred years earlier, the state was re-founded, not on a democratic basis (though democratic forms were at first allowed to survive), not on a soviet basis, but on a basis that welded elements of both into a native authoritarian tradition, and produced, within five years of the appearance of the first, a second and an even more strident alternative to the hitherto prevailing trend in government. The two new alternatives, while professing to abhor each other, differed less than either differed from political democracy, and both chose to look upon the citizen as a worker rather than as a householder, to see a nation rather as a series of human hives than the statistical sum of its adult inhabitants. But the one tolerated and indeed protected drones, whereas the other would give recognition and power only to the workers.

*Italian fascism, because it could be built up on the traditional bases of the state, and destroyed none of the existing economic or social classes within it, found ready imitators even where the*



soviet example was most feared; and as country after country that had taken up democracy and adopted libertarian institutions, began, for one reason or another to find, like Italy, that things did not work out as anticipated, the authoritarian state organized on a corporative basis became a commonly accepted form.

A fourth alternative also existed — for the democracies to adapt themselves to new needs and to the demand for a more adequate recognition of the economic side of human organization through the creation of fresh governmental machinery. Most of the libertarian states, and notably France and Britain, contented themselves with piecemeal treatment of these problems, that same ad hoc procedure as had preceded the more systematic reform of British institutions in the nineteenth century, and time must show whether or not systematization, such as produced the complete reorganization of local government and the courts of law in nineteenth-century Britain, will emerge in time in the sphere of producer and consumer relationships (to each other and to the state) to prevent in Britain (and in certain other libertarian countries) a breakdown of confidence in existing machinery and in the progress of reform such as will produce acceptance of one or the other ready-made alternatives.

In two countries among the great powers more systematic treatment of the same symptoms has been attempted. Republican Germany included, in her new constitutional system of 1919, machinery (centering in the Reichswirtschaftsrat) that aimed to fill the gap, and might conceivably have been developed to do so in circumstances less unpropitious, but when the new system did not work, the democratic state, together with its producer-organization (the consumer side was little considered), was overthrown in a mood of despair for a fresh panacea, which, served up in Teutonic guise as the National Socialist state, many of the new ideas on government that the post-war period had produced, combined with some devices hoary in their antiquity, and tackled the problem of citizen, producer and consumer with all the ruthlessness and more than the ingenuity of the Russians and the Italians, though without the originality of either. The fate of this variation on two alternatives has also to be awaited.

The United States of America, content with the piecemeal methods of the other democracies during a decade of unrivalled prosperity after her war of 1917-18, turned to less traditional machinery when the great depression which began in 1930

*plunged her into her worst economic crisis and the first since the safety valve of the frontier had completely ceased to exist. Without recourse to a new interpretation of the citizen or the adoption of a new system of representation based on economic categories, she nevertheless resorted to state-planning as thoroughgoing as that of Soviet Russia, and to the codification of producer, entrepreneur and consumer relationships of all kinds as minute as that of fascist Italy (and in both spheres her task was of necessity far more complicated, through her greater degree of industrialization and her higher standards of life). In her case the new machinery had to be introduced into the gaps in her existing political system, which was regarded as basically immutable virtually by all concerned. Much of this machinery has now dropped out, more has been ejected by the system itself, but enough remains yet to achieve a major transformation.*



## CHAPTER XXVI

### THE RUSSIAN ALTERNATIVE — SOVIET AS NUCLEUS

THE Tsarist machinery of government in the Russian empire had shown itself to be so completely inadequate, even as the starting point of a libertarian *régime*, that the revolution of 1917 was able entirely to ignore it. The traditionless *Douma* of the intelligentsia was unable to step into the gap. Kerenski was no more successful than Prince Lvov in stabilizing a democratic system, and the left wing social democrats, the bolshevist party led by Lenin, that seized power in October and November 1917, were able to prevent the scheduled constituent assembly from meeting. This procedure was exactly the opposite of that which was followed in Germany a little over a year later, when the central council of soldiers and workers (modelled upon the organization of soviets which were the basis of the bolshevist authority in Russia) meekly handed its power over to the new constituent assembly that was later to frame the Weimar constitution on the libertarian model.

THE  
BOLSHEVIKS  
SEIZE POWER

With the postponement (and eventual strangulation at birth in July 1918) of the Russian constituent assembly that had been expected to produce a democratic constitution of a more or less conventional type, the field was left clear for Lenin, a supremely able practitioner of revolution who had distilled from the writings of Karl Marx and from his own interpretation of the course of history since Marx, a theory of government and a programme of action that involved rejecting all the libertarian and democratic machinery of the expressionist state in addition to the autocratic and repressive practices

of legitimist *régimes*, in favour of building up a new type of governmental organization, which should create an anti-state rather than a state. He and his colleagues, while still relying on the existing organization of their party for directive and executive purposes, made use, as the expressionist unit of their system, of the soviet, a spontaneously generated by-product of the revolution of 1905. The soviet (a council of workers or soldiers) was a simple cell admirably suited to their purposes, for out the mass of soviets could be evolved the most complicated organisms required for the working out of their ideals. To use the Communist party as the operating, and the congresses of soviets as the ratifying machinery of government was magnificent improvisation. This parallelism, admittedly an expedient at the beginning, has continued ever since to be an essential and perhaps the most powerful feature of the constitutional system founded in Russia in 1917. The "party line" of development has, in addition, been the most powerful lead that revolutionary Russia has given to other countries. Soviets sprang up like mushrooms in a number of other lands during the years immediately succeeding 1917, but everywhere outside (and in some places, such as Finland and the three Baltic states, inside) the former territories of the Tsar, they were as easily plucked out. The "one-party state", on the other hand, has become (after being at first derided everywhere) a permanent attraction, even to those *régimes* otherwise most violently opposed to bolshevist ideas.

THE ONE-PARTY STATE The amiable Atatürk, of whom it has been said that his fine sense of justice inclined him toward trying everything and everybody at least once, had an opposition party created in order that the game of parliamentary government could be played according to the established rules, only to retreat behind the one-party line when, in his country as in many others, chaos rather than order seemed to emerge. The Bolshe-

viks in 1917 had enough chaos on their hands to want at all costs to avoid producing more, and the one-party state (even if they refused to call it a state, and it certainly did not look like one to orthodox political science) was their trump card. It was a ruthless device but it worked, and against chaos or alleged chaos in other lands a policy of "Clubs are trumps — no other suit allowed" has subsequently been found to work only too well. To the state of one-party policies and no party politics the idea of "His Majesty's Opposition" toward which His Majesty's Government has not only to be tolerant but also polite (and whose leader receives an official salary), seems as outmoded and as unreal as those eighteenth-century battles in which one's opponents were courteously invited to shoot first. Lenin and his followers thus released into the world in the one-party state an idea that has come to be the *Leitmotiv* of an un-Tolstoyan era of totalitarian war and equally totalitarian peace.

If the structure of this new and mighty governmental machine of bolshevist Russia was composed of permutations and combinations of soviets, and if the motive force was supplied by the organization of the Communist party, it still needed a purpose to justify the existence both of the machinery and of the power. The party was only a means to an end and the soviet was only a means to an end. That end was not to be the libertarian expressionism of political democracy, but was proclaimed to be the creation of a *classless society* in which men and women were to receive reward only for their own labours (but for all of their labour) and in which "he who does not work shall not eat". This end was construed as involving the treatment of the citizen primarily as a consumer and as a producer (everybody was of necessity a consumer and was now, by compulsion, to be a producer as well) and only incidentally as a voter. His vote derived only from his activity in production and consumption, or in

A CLASSLESS  
SOCIETY

their co-ordination. His part in the government of his country arose, therefore, in the course of his working life, and not as something entirely divorced from it for which he put on his Sunday suit. He expressed himself and voted as a member of a trade union, of an *artel* (a co-operative of individual producers) or of a collective farm ; he expressed himself and voted as a member of a consumer's co-operative ; he expressed himself and voted in his local soviet, which was organized on the basis of where he worked and not (unless the two coincided) of where he lived ; he could, finally, if these outlets were

ACTIVE  
CITIZENS  
AND MERE  
INHABITANTS

not enough, and he wished to be a really "active citizen" as opposed to a "mere inhabitant", seek admission to the Communist party and express himself and vote

in the local branch (also based, usually, upon place of work). In any of these he might be chosen a delegate to a district or provincial or even to the central council or congress of soviets, of trade unions, of *artel*, of collectives, of co-operatives, or of the Communist party. These organizations have been likened to a group of pyramids, each rising to the apex of a central congress (the soviet pyramid to the sharper point of a central executive committee and a Council of People's Commissars, and the Communist party pyramid also to that of a central committee and a political

"A GROUP OF  
PYRAMIDS"

bureau or inner committee), and this is indeed a useful if a somewhat generalized picture to leave in the mind, a group of great pyramids towering around and connected by subterranean passages to a sphinx whose face at the moment is that of the General Secretary of the Communist party. Its hostile critics call this system in its practical working "the most ruthless dictatorship of modern times", but more friendly ones sum it up as "not a dictatorship but government by a whole series of committees" and call it "multiform democracy". It is certainly multiform.

If the multiformity of the administrative system of bolshevist Russia made it difficult at first to accept it as a state in any understood sense of that word, the amorphous nature of its territorial agglomeration only served to increase this difficulty. A number of provinces in the western part of the Russian empire had broken away from it completely, with or soon after the advent of the revolution. After a period of uncertainty and war lasting for several years, some of these (Finland, the three Baltic States, the former Russian Poland and Bessarabia) found themselves definitely (and, it appears, permanently) outside the bolshevist sphere of influence, but others (the Ukraine, White Russia and Transcaucasia, as well as the remote trans-Caspian regions south of the Aral Sea and Lake Balkash), while retaining their new national independence, found themselves, sooner or later, equally definitely and permanently inside it, and accepted the soviet structure, the classless society and the domination of the Communist party instead of violently rejecting them like Finland, Poland, Rumania, Esthonia, Latvia and Lithuania.

At the beginning, the original Russian Socialist Federative Soviet Republic (comprising all the territories of the empire that did not break away, and covering roughly three-quarters of its area in 1914) was the only one directly under Bolshevik control, and had no definite constitutional connection with the independent soviet republics on its western and southern borders. This R.S.F.S.R. was something tangible to western eyes, even if its form was not familiar to political science, from the time it received a written constitution (based upon the principles enunciated in the "Declaration of Rights of the Labouring and Exploited Peoples" which formed its first section) on July 10, 1918, by resolution of the fifth All-Russian Congress of Soviets. On the other hand, what is now known

TERRITORIAL  
AGGLOMERATION

THE  
R.S.F.S.R.  
AS NUCLEUS



as the Union of Soviet Socialist Republics (formed by a series of treaties and agreements between the R.S.F.S.R., the Ukraine Soviet Republic, the White Russian Soviet Republic and the Transcaucasian Soviet Republic) did not come into existence until 1922, and its first constitution did not come into force until January 13, 1924, within a few days of the death of Lenin.

THE U.S.S.R.  
AS CONSUM-  
MATION

In a way this was symbolic, for while the social and economic structure of the bolshevist state was primarily Lenin's own achievement, and was crystallized (to the extent that it could be crystallized in a single document and at that early stage in the revolution) in the R.S.F.S.R. constitution of 1918, the national and federal structure was above all the work of Stalin (who became, after Lenin's death, and has remained, the leading figure in the bolshevist hierarchy) and was crystallized in the U.S.S.R. constitution of 1924. Both these constitutions have now been replaced by new fundamental laws, that of the R.S.F.S.R. in 1925 (to which have since been made piecemeal amendments from time to time) and that of the U.S.S.R. in 1936, but their basic principles have not, it is claimed, been affected by these changes.

The regions originally outside the R.S.F.S.R., or subsequently separated from it, that now belong to the larger union of all soviet states formed out of territory formerly belonging to the Russian empire, have adopted constitutions based upon similar principles, and these have been amended in step with the changes in the R.S.F.S.R. and the U.S.S.R. But only the R.S.F.S.R. and the White Russian Soviet Republic bear the name "Russian" and the U.S.S.R. itself, which carefully avoids that word in its title and in its public documents,

U.S.S.R. NOT A  
"RUSSIAN"  
STATE

is technically not a Russian state at all. Without alteration to its constitution it could accept a sovietized Poland, a sovietized Rumania, or even a sovietized Japan (examples are

taken from countries sharing a common frontier with the U.S.S.R., though the list could include the whole world) as a constituent republic of the Union. Constitutionally its expansive possibilities are as great as were those of the federal union set up in the United States of America in 1787, and its achievements as a "state-maker" have, taking the shorter period of existence of the U.S.S.R. into account, hardly been less considerable. The four constituent republics of 1924 had, by 1936, become eleven, though the increase had all come, not from any territorial expansion, but from alteration in governmental status among various parts of the Soviet Union. The Transcaspian region north of the Afghan and Persian borders where Bolshevik control was at first uncertain, was gradually organized between 1924 and 1929 on the basis of complete national independence of the Russian Soviet Republic, but with membership of the U.S.S.R. retained, into three separate soviet republics, the Turkoman, the Uzbek and the Tadzhik, and then, in 1936, the revision of the constitution of the U.S.S.R. provided an opportunity for dividing the nationally heterogeneous Transcaucasian Soviet Republic (which, as such, ceased to exist) into three separate soviet republics, the Georgian, the Armenian and the Azerbaijan, stretching (in the order named) from the Black to the Caspian Sea. Finally, the two autonomous regions of the R.S.F.S.R. lying immediately to the north of the three Transcaspian soviet republics were now given their national independence by being separated from the R.S.F.S.R. to become two constituent republics of the U.S.S.R., the large Kazak Soviet Republic and the smaller Kirghiz Soviet Republic along the Mongolian border.

THE  
CONSTITUENT  
REPUBLICS

It is not improbable that other of the autonomous regions on the borders of the R.S.F.S.R. may in the future become separated from it as constituent republics of the U.S.S.R., with the theoretical constitutional right

to secede from the Union (a right not accorded to mere autonomous regions), though Stalin has set his face against the idea of all autonomous regions of the different soviet republics being able to look forward to such an advance in status. For those of the autonomous regions (sometimes called "autonomous republics" if within the R.S.F.S.R.) that are surrounded on all sides by U.S.S.R. territory and not bordered at any point by a foreign state, the right of secession that promotion to be constituent republics might give them would, Stalin points out, be meaningless, for "they have nowhere to go if they secede from the U.S.S.R.". For rather similar reasons it would be more difficult for Kentucky or Kansas to secede from the U.S.A., than for Maine or Texas or California, were all given the equal constitutional right to do so, but the U.S.A. has solved the problem by refusing to countenance the right of secession for any of them. In practice it is probable that any constituent republics of the U.S.S.R. would find it quite as difficult permanently to secede from the Soviet Union as did the eleven Southern States to secede from the American Union in 1861.

The differences between the federal constitution of the U.S.S.R. in its 1936 and in its original 1924 version, though important, are perhaps not as great as might have been expected in view of the enormous changes that took place in the Union during those twelve years. At the beginning of 1924 Lenin's New Economic Policy, a temporary dilution of pure socialism with certain features of capitalism, had not yet been abandoned, nor had Trotsky's idea of world revolution given way to Stalin's "socialism in one country". In 1926 the first five-year plan, of large scale industrialization and increase in production of every sort, was formulated, and in 1928 put into operation, to be succeeded by a second five-year plan in 1931 and by yet a third in 1936. The retreat from

THE RIGHT  
TO SECEDE

U.S.S.R. CON-  
STITUTIONS OF  
1924 AND 1936

world revolution and the advance of the era of planning were accompanied by a return to the international concert, with membership of the League of Nations and adhesion to the Kellogg Pact, and finally, in the sphere of foreign relations, the U.S.S.R.'s series of pacts of non-aggression were supplemented by definite alliances with France and Czechoslovakia.

The population of the U.S.S.R. had increased in the decade 1926-36 from 147 to nearly 166 million people. The industrial population had risen from eight million in 1922 to over twenty-five million, while compared with before the war nearly twice as large a percentage of the people (35 instead of 20) lived in cities. Some of these changes were inevitably reflected in the new constitution of 1936, even though the basic organization of the soviets and the basic control of the Communist party remained unimpaired. Many of the solid achievements of the intervening period (such as the complete elimination of the private capitalist, of the employer class in industry, and of the *Kulak* in agriculture) made it possible to draft the 1936 document in more positive terms. It could be made a statement of the type of government that had actually been evolved rather than a programme for the type that was desired. It lacked the flamboyance, perhaps even some of the enthusiasm of its predecessor, and certainly some of its heterodoxy. While Lenin had regarded the state as a device for enslaving the people, and as a concept the remnants of which could be expected to wither away under the soviet system, Stalin, in 1936, laughed at critics who tried to maintain that the U.S.S.R. was not a state but "nothing more nor less than a strictly defined geographical concept". It is true that the U.S.S.R. (or even the R.S.F.S.R.) was in no sense a nation-state, for the Bolsheviks had "divorced the state from nationality and race" so completely that foreigners living and working in the U.S.S.R. were allowed to vote and participate

ACHIEVEMENTS  
OF THE  
INTERVENING  
PERIOD

in public affairs on a basis of complete equality with natives, and the name of the Union, as has been seen, bore no national or racial label, but it was, by 1936, unquestionably a state, with one foreign policy, one united army, one social system and one general type of government for all its parts, though a high degree of autonomy in domestic affairs was enjoyed by many of these parts, especially the eleven constituent republics.

Though the truly federal nature and objects of the U.S.S.R. are not generally questioned (the more closely consolidated Russian Republic, though called "federated" stands in a more doubtful position), there are, nevertheless, critics, who see in the "great Russian Chauvinism" that Lenin is alleged to have attributed to Stalin, and in the purge of high officials in nearly all the constituent republics, a menace to the U.S.S.R. as a federal union, and who anticipate for the future, instead of greater autonomy for its parts and an increase in the number of constituent republics, a new policy of consolidation, so that it may again become "Russia, one and indivisible".

The constitution of the U.S.S.R. of 1936 declares the Union to be "a socialist state of workers and peasants" (article 1) and its first section is devoted to defining "The Structure of Society". Property is defined as that of the state, that of cooperative-collectives and that of individuals, and while the last is allowed to exist and to be inherited, its permissible forms, origin and extent are carefully defined (article 10). Article 12 repeats the slogans "He who does not work shall not eat" and "From each according to his ability, to each according to his work". The second section of the constitution deals with "the Structure of the State", article 13 naming the eleven soviet socialist republics "united in voluntary union", article 14 listing under twenty-three headings

"THE STATE"  
REINSTATED

U.S.S.R.  
FEDERALISM  
AND ITS  
FUTURE

"THE  
STRUCTURE OF  
SOCIETY" IN  
THE U.S.S.R.,  
1936

the sphere of action of the central authority of the Union, and article 15 leaving residual powers in the hands of the separate republics ; article 16 requires that the constitution of each soviet republic shall be drawn up "in full conformity with the constitution of the U.S.S.R." ; article 17 gives the right of secession to the constituent republics and article 18 guarantees the integrity of their territories ; articles 19 and 20 declare the laws of the U.S.S.R. to be supreme in all the republics and as prevailing over the laws of the separate republics, while article 21 prescribes a common citizenship for all inhabitants of all the parts of the U.S.S.R. The third section of the constitution deals with "The Highest Organs of State Power" and considerably simplifies the system of 1924. The "All-Union Congress of Soviets" of the earlier system is replaced by a "Supreme Soviet", meeting twice a year instead of once, and consisting of two chambers with identical powers, elected directly, instead of one, elected indirectly. They are known as the "Soviet of the Union" and the "Soviet of Nationalities". The former is to represent the people as a whole, and the latter contains not only an equal number of delegates from each constituent republic, but also a smaller number from each autonomous republic, autonomous region, and recognized national region contained within any constituent republic. In joint session the two chambers elect a Praesidium of 36 members to exercise certain carefully defined powers (article 49) on behalf of the Supreme Soviet between its sessions, but not to legislate. The shadow of recent developments in foreign policy falls across part of a clause (j) of article 49 (the last seventeen words were inserted at a late stage in the draft constitution) which says that the Praesidium may "In the intervals between sessions of the Supreme Soviet of the U.S.S.R., declare a state of war, in case

"THE  
STRUCTURE OF  
THE STATE"

"ORGANS  
OF STATE  
POWER"

THE  
PRAESIDIUM

of an armed attack upon the U.S.S.R., or in case of the need of fulfilling international treaty obligations of mutual defence against aggression". The previous "Council of Nationalities" which had been part of the Central Executive Committee of the U.S.S.R. (section four of the constitution of 1924) was suppressed, and generally the deliberate confusion of executive and legislative functions, that had been a characteristic of the earlier constitution-making of the Bolsheviks, was avoided.

No longer can it be said that between legislation and administration no line is drawn, though it has to be remembered that institutions are still regarded in the Soviet Union as existing primarily to carry out a policy, and thus they tend to be changed not only as policy is modified, but when and directly they do not appear to be aiding in the carrying out of that policy. The dead hand of constitutional forms that must be adhered to,

POLICIES

MOULD

INSTITUTIONS

even if generally approved policies have to be modified or abandoned in so doing, such as has been the case in the United States on a number of occasions in recent years (notably with regard to the proposed prohibition of child labour throughout the Union), has not been allowed, as yet, to hold developments in the U.S.S.R. in its frozen grip. The constitution of the U.S.S.R. (and this applies to the other soviet constitutions) is not, though it has been put on paper, fixed or rigid in any way. The idea of the state may now have been accepted less grudgingly than at first, but the state remains only a means to an end, and has not become an end in itself. Whatever may be thought of the particular ends that the Bolsheviks desire, it must at least be conceded that this view of political institutions and of the state allows these ends to be pursued with great singleness of purpose and tremendous vigour of expression. Many other lands have, with varying degrees of success, attempted to infuse a like ability to facilitate a planned course (and to respond rapidly to

emergency changes of helm) into their own institutions.

The fourth section of the constitution of 1936 lays down the broad lines on which the government of the constituent republics is to be founded. A unicameral Supreme Soviet in each is, like that of the U.S.S.R., to be elected for a period of four years by direct universal secret ballot of all inhabitants over eighteen years of age, and is to elect its own Praesidium (article 61) and appoint as executive of the republic a Council of Peoples' Commissars (article 63).

GOVERNMENT  
OF THE  
CONSTITUENT  
REPUBLICS,  
1936

The fifth section of the constitution, dealing with the organs of state administration of the U.S.S.R., defines the powers and composition of the All-Union Council of Peoples' Commissars. Though the competence of this executive body is wide, it is held (article 65) strictly accountable to the Supreme Soviet, or, when that body is not in session, to its Praesidium. This clear recognition of the responsibility of a supreme executive to a supreme legislative body was not to be found in the earlier constitution. While the prevailing European trend between 1924 and 1936 had been in the direction of making the executive more independent of the legislature, that in the U.S.S.R. thus appears to have been in the opposite direction. According to the letter of the constitution at least, the system of 1936 would appear to give the legislative body known as the Supreme Soviet both the first and the last word in the actual government of the U.S.S.R., leaving to the Peoples' Commissars the sphere (responsible execution and administration) between. Theoretically at least, the Council of Peoples' Commissars appears to stand well above the President's cabinet but well below His Majesty's government, but it no longer has the "unlimited powers, subject to recall" that the earlier commissars appear to have wielded with constitutional sanction. One very significant change (already foreshadowed by piecemeal reorganization of that department) is the complete

EXECUTIVE  
RESPONSI-  
BILITY TO  
LEGISLATURE  
INCREASED



absorption of the functions of the State Political Department (the O.G.P.U.), a distinct organization under the constitution of 1924 (section IX), in the work of the Commissariat of Home Affairs. Devolution of administrative functions to the constituent republics, while remaining, is not so extensive as before, and a distinction is carefully drawn (articles 75 and 76) between All-Union Peoples' Commissariats (including defence, foreign affairs, foreign trade, communications and heavy industry) which act directly in all parts of the U.S.S.R. and Union-Republic Peoples' Commissariats (including agriculture, finance, internal affairs, justice and health) which act in the main only through like-named Peoples' Commissariats of the constituent republics.

LOCAL ORGANIZATION OF STATE POWER      The sixth section deals with the organs of state administration of the constituent republics and provides a system of Union-Republic and Republic Peoples' Commissariats. The seventh section covers the same field for the autonomous republics existing within certain of the constituent republics. The eighth section deals with local organs of state power from territory (*Krai*) down to the smallest urban or rural locality, the village varying in organization in different parts of the Union.

THE JUDICIAL SYSTEM      The ninth section deals with the judicial system. Members of the Supreme Court, and of all others in the judicial hierarchy, hold office for five years (except those of the People's Courts where the period is three years) and are elected by the soviets in the areas over which they hold jurisdiction (the Supreme Court of the U.S.S.R. by the Supreme Soviet of the U.S.S.R., the Supreme Courts of the constituent republics by their Supreme Soviets, and so on). The Supreme Court of the U.S.S.R. is "charged with the supervision of the judicial activities of all the judicial organs of the U.S.S.R. and of the constituent republics" (article 104); judges are declared independent of all

other authorities in the state (article 112) and the practice of having peoples' associate judges sitting in all courts (an interesting procedure dating from the earliest days) is to continue (article 103). The Attorney General of the U.S.S.R. receives his appointment from the Supreme Soviet for seven years, and himself appoints all state attorneys for terms of five years, while the appointment of district attorneys by these state attorneys require his confirmation. The whole hierarchy of state and district attorneys "functions independently of any local organs whatsoever" (article 117).

Section ten outlines the "Basic Rights and Duties of Citizens" and is much nearer in form to the ordinary libertarian type of declaration of rights than any of the more rhetorical statements of rights produced early in the revolution. As much had obviously happened to this revolution between 1918 and 1936 as happened to the French Revolution between 1789 and 1795, and again a declaration of the rights of man and of the citizen (the "Declaration of Rights of the Labouring and Exploited People" in which the Third Congress of Soviets expressed, on July 10, 1918, "its absolute resolve to liberate mankind from the grip of capital and imperialism") gives place to a statement of the rights and the duties of "the citizens of the U.S.S.R." alone. Mankind as a whole is not mentioned, but, significantly, "the All-Union Communist Party [of Bolsheviks]" is (article 126). Many of the crudities and punitive exclusions of the earlier declaration are eliminated (for instance, article 123 declares "Equal rights for citizens of the U.S.S.R., irrespective of their nationality or race, in all spheres of economic, state, cultural, social and political life, shall be an irrevocable law") but much of its ability to stir men's souls has gone as well. For better or for worse the avenging angel has given way to the recording angel.

The revised electoral system outlined in the eleventh

RIGHTS AND  
DUTIES IN  
1918 AND IN  
1936

section of the constitution has received the greatest attention abroad as well as having been given the greatest amount of publicity in the U.S.S.R. itself. This is significant, for it is the place where the closest approximation to the accepted principles of the orthodox democratic state is to be found. Like the declaration of rights, the electoral system has now become "respectable" if not yet entirely orthodox. The principle of a universal franchise is really carried to its logical conclusion. All persons within the U.S.S.R. at the time of an election (including people who are not citizens but who are engaged in work in the country) who have attained the age of eighteen years, have the right to vote, certified imbeciles and persons disqualified as part of a court penalty alone excluded. All the other disbarred classes of the earlier soviet franchise disappear (article 135). Every citizen has one vote only and all voting is secret; elections of every sort are direct; every deputy has the duty of reporting on his work to those who elect him, and he is at any time subject to recall by a decision of a majority of the electors in his district. The system of nomination alone departs from the canons of this strict democratic orthodoxy, for (article 141) "The right to nominate candidates shall be ensured to public organizations and societies of working people; Communist party organizations; trade unions; cooperatives; organizations of youth; cultural societies". No haphazard agglomeration of a prescribed number of citizens can nominate, nor can electoral primaries (except any that may be organized *ad hoc* by and within the Communist party or other of the named groups) be run off. The filter of adoption by an approved organization has to be passed through by every candidate. In theory this might still produce quite a number of candidates in any given electoral district (for instance, the letter of the constitution would permit religious communities to put forward candidates), but in the first election held after

THE REVISED  
ELECTORAL  
SYSTEM

the new constitution came into force, that of December 12, 1937, in no constituency (for this traditional word may once again with propriety be used) was more than one candidate finally presented to the voters.

This state of affairs has been variously interpreted : by some as evidence of the striking unanimity of sentiment that must and does animate a classless society from which the mock battles of capitalist political parties have long been eradicated ; by others as the old authoritarian Adam at work again, reducing a theoretically free election to a controlled plebiscite and using the very methods that have been adopted more openly by avowed fascist *régimes*. Whatever may be thought of the alleged practical approximation of soviet to fascist elections under the new constitution, it must at least be recognized that orthodox democratic practice is left behind before article 141 is reached, and is well out of sight by the time elections come to be held. But then, soviet democracy is not orthodox democracy, it is " an incomparably higher form of democracy ". Certainly the greatest formal reproach levelled by democrats at the earlier soviet system of voting, the disproportionate voting-power given to the urban population (one delegate for every 25,000 electors, whereas outside cities it was one for every 125,000 inhabitants, which was roughly equivalent to giving each urban elector two votes to each rural elector's one) was removed in 1936, but how much this was done out of regard for democratic equality and how much simply as a result of the reorganization of rural life, combined with an increase in the urban population to 35 per cent of that of the whole Union, and of industrial workers to twenty-five millions (or nearly threefold since 1921) is again problematical. It was certainly not deemed safe for the revolution immediately to accord an overwhelming voting majority to the vast though uncertain quantity of rural workers, any more than it was felt wise, even in

A DEMOCRATIC  
FRANCHISE ?

the cities, to let the directive control of the machinery of government out of the hands of members of the Communist party. A completely equalitarian franchise, coming after nearly two decades of revolutionary government, can just as well be regarded as a sign of strength and consolidation as of inconsistency and backsliding. It depends on which end of the telescope is placed to the eye.

The twelfth section, dealing with the emblem, flag and capital of the U.S.S.R., and the thirteenth, prescribing the procedure for amendment, complete the constitution of 1936. Amendment now becomes a somewhat harder process (indeed, the earlier constitution had been described as the most mobile known to political science), the familiar two-thirds majority in each chamber of the central legislature (the Supreme Soviet) being required, instead of a simple majority in the unicameral All-Union Congress of Soviets. Just as legislation has been made distinct from administrative acts, so now also constitutional amendment is made distinct from ordinary legislation. One wonders what Lenin would have commented on this circling of the Red square.

A not unfriendly critic commented on the draft constitution of 1935 (from which the constitution of 1936 did not vary in essentials) that, to the extent of limiting party organization to the Communist party "the régime is to remain a dictatorship", but apart from that he sees in it "an immense advance over past technique", appears pleased that "The legislature is made supreme over the executive" and that there is "limitation at every point of executive discretion such as Russia has never known", rejoices that "the place of the individual in the soviet scheme receives an emphasis and an importance he has not previously possessed", and in his inevitable search for the abode of sovereign power, inclines to

AMENDMENT  
OF CONSTITU-  
TION MADE  
LESS SIMPLE

CONSTITU-  
TIONAL  
TENDENCIES  
OF 1936

think it "likely to reside in the Praesidium of the Supreme Soviet". A tendency for the membership of the Praesidium to include the leading figures in the central organization of the Communist party has given practical underlining to its constitutional prominence, beside preserving a clear link between the new and the earlier system of government in the Soviet Union and its constituent parts.

Despite the continued existence of the Comintern, and an undoubted interest in furthering the cause of world revolution during the early years, the soviet system of government has not been extensively adopted, openly and under its own name, outside the lands of the former Russian empire. Both Hungary and Bavaria had short-lived soviet governments in 1919, and other parts of Germany, in addition to the Baltic States, Finland and Poland, contained for a while strong pro-soviet elements, but neither there nor in any of the other states immediately bordering Soviet territory — Turkey, Iran, Afghanistan and China — did a soviet system come to maturity, with the single exception of that part of China (and it was a part changing in area and location from time to time) that remained under control of the Communists after the break-up of the Communist-Kuomintang alliance in 1927. Continually harried by the forces of Chiang Kai Shek, the leaders of this somewhat amorphous "Soviet China" seem nevertheless to have developed and maintained a soviet offshoot roughly similar in structure, though simplified, to the parent stem, and even to have carried it with them in their hand-baggage on their great trek from Kiangsi through Szechwan to Shensi in 1934. A "First All-China Soviet Congress" had, in 1931, adopted a set of fundamental laws for the Chinese Soviet Republic, derived clearly from Russian soviet models (even to the extent of organizing industrial life, though the area controlled was completely

THE SOVIET  
SYSTEM  
ABROAD

SOVIET CHINA

devoid of industrial development), and even after the great trek the Chinese soviets were almost exclusively soviets of peasants, who like those of Kiangsi, had first to be taught that a soviet was not a person called Su Wei Ai, but the unit of a new order of society. News from Soviet China has not tended to figure prominently among its meagre exports, and the impressions of the few outside commentators who have ventured into its territories remain as yet uncorroborated, but whether approaching it from the right or from the left, these commentators seem to have been struck by the sincerity of the experiment and to agree that, within a limited sphere and in skeleton form, a real and not a pseudo-soviet system has been set up. To what extent the recent working agreement reported as having been made between the Chinese Communists and the Kuomintang for a common front against the Japanese may result either in dilution or alternatively in a wide extension of their principles, remains as yet, like so much else concerning Soviet China, a matter for somewhat unprofitable speculation . . . or for a reservation of judgement.

Whether ten days that shook the world and twenty-one years that have continued to shake one-sixth of it have produced, in the bolshevist reorganization of human life and human endeavour on the basis of soviet communism,

THE SOVIET  
PARADOX

a new civilization and a new species of government, is still under violent discussion.

An eminent British scholar with unimpeachable conservative antecedents and an intimate knowledge of Tsarist Russia, observes that the old barriers and distinctions between those who govern and those who are governed have disappeared, and concludes that this new civilization has been created ; a British trade-union leader with neither, observes that wash-basins in the U.S.S.R. tend to have no plugs and baths no overflow pipes, and concludes that it has not ; a great American industrialist of fanatical *laissez faire* individualism of out-

look is able to co-operate wholeheartedly with this wholly socialized economic system ; an American social philosopher of a progressive turn of mind is able to regard it only as a primitive tyranny. The line of paradoxes could be stretched out almost indefinitely, and, indeed, that is but natural concerning something that in itself seems to many to be one of the greatest paradoxes in all history. Of those who have asked the question " A new civilization ? ", some have gone on to amend it by deleting the mark of interrogation, but others have felt it necessary to remove the word " new " and repeat the question.



## CHAPTER XXVII

### THE ITALIAN ALTERNATIVE—*FASCES* AS NUCLEUS

UNLIKE imperial Russia, the kingdom of Italy possessed in 1914 a written constitution, a democratic *régime*, libertarian institutions and a parliamentary system of government of the approved type, and although all but the first of these (and much of that) have now disappeared, the break with the past immediately following the march on Rome in October 1922, was neither catastrophic nor uncompromising. The Italian fascist state as it existed a decade and a half after the march on Rome had been

EMPIRICISM  
OF FASCIST  
ITALY

built up gradually by a process of trial and error, with an empiricism of outlook that contrasts sharply with the doctrinal planning of the Bolsheviks in Russia and of the National Socialists in Germany. The Italian Fascist party has never possessed its own particular bible. No "authoritative interpretation" has remained authoritative long. It has no *Das Kapital*, no *Mein Kampf*. Its philosophy, in so far as it possesses one, is that of its *Duce* at any given moment, and it is characteristic of the first holder of that office that he has never felt himself bound by his previous utterances or actions. An institution is abandoned or modified as easily as a policy, and the change may reflect a complete reversal of attitude and of doctrine. No *régime* in history has been less doctrinaire.

No system of government which had been developed in Europe since the time of the first Napoleon depended

DEPENDENCE  
ON ITS  
FOUNDER

so much, or continued so completely to depend upon the personality of its founder as Italian fascism. From the first its strength lay in his strength and its future came to be

identified closely with the state of health of his body and mind. Commentators have united to shake their heads over this salient characteristic of the *régime*. "The fascist system depends on a genius, and with his passage it must pass", writes one, while another is appalled at the sight of "a twentieth century society whose future is so precarious". But this government *par excellence* "of man and not of the law" has yet to be put to its supreme test of stability, and here it is its past developments and its present situation rather than its problematical future that must pass under review.

A system whose principles can constantly be questioned even by its own supporters, but its *Duce* never, must inevitably revolve around what prompts the decisions of its final arbiter rather than around the structure of laws and decrees through which it has been elaborated. Like Nature and the mind of its *Duce* and *Capo del Governo*, the government of fascist Italy is in a state of perpetual flux, advancing to new positions, receding from rash experiments, its machinery at one moment surging into an overdrive, at the next grinding into reverse, but never remaining in neutral. The personal background of the founder of the Italian fascist state is as empiric and as dynamic as what he has created. A left wing journalist who knew his Marx, edited a journal called *La Lotta di Classe* (The Class Struggle), went to prison and into exile for his opinions in his early years, Benito Mussolini crossed his first Rubicon when, in circumstances concerning which accusation and counter-accusation still fly, he abandoned the leading socialist newspaper *Avanti*, to found the anti-German interventionist *Popolo D'Italia* at the end of 1914. That strong anti-nationalism which had caused him to oppose Giolitti's war with Turkey in 1911 now turned to an equally vehement nationalism in which his Marxism was entirely submerged, though not completely dissolved. Nationalist war was still seen as

BACKGROUND  
OF THE  
MARCH ON  
ROME

the way to social revolution. But while the very first fascist organizations, arising spontaneously to further the interventionist cause, were called "groups for revolutionary action" (*fasci di azione rivoluzionaria*), Mussolini's own *Fasci di Combattimento* (founded with 145 members on March 23, 1919, at Milan) rejected the bolshevist theory and practice of revolution and opposed the Italian Socialist party (from which Mussolini had been expelled in 1914), though he still called himself a revolutionary socialist. The idea of national regeneration at the hands of an *élite* that would rise out of the inert masses of the people, as the *Arditi* had risen out of the ranks of the army during the war, came more and more to animate Mussolini and his "bundles" of disgruntled war veterans, returned to a land that was still fitter for heroes to die than to live in, and that had been robbed by its allies of what it considered to be a large part of its legitimate fruits of victory. The syndicalism that animated his labour policy became strictly national in outlook, and gradually, in the period between 1919 and 1922, he was able to place pontoons across his second Rubicon and to connect his proletarian war veterans of the *Fasci di Combattimento* with the discontented middle class that the post-war epidemic of strikes and the occupation of factories by the workers had thoroughly alarmed and disgusted, with the aristocratic feeling that had long distrusted parliamentary institutions but now despised them as ineffective against such revolutionary and anti-capitalist disorders, and with the idealistic and flamboyant chauvinism that had taken D'Annunzio and his group of adventurers to Fiume, to combine all these elements in the Italian Fascist party which recognized him as *Duce* and achieved the march on Rome in October 1922. It was a motley army, and Rome was at first its only common objective. Though its black shirts might be uniform, they were accompanied by ties of many sorts. People were in the party for jobs, for revenge and for fun,

as well as for national regeneration, for efficient government and for a planned economy. Its awkward *squadristi*, the fighting sub-groups that had carried on guerrilla warfare with every known weapon from the machine-gun to the castor-oil bottle, had to be liquidated, if the party, in power, was to become associated with public order and decorum. This could not be done in a day. The way to the Palazzo Venezia had been hard for Benito Mussolini, but the journey to and fro each day proved even harder. Government and policy for a while remained entirely *ad hoc*. The elaboration of new institutions had to wait.

It must be remembered that Mussolini's ministry of October 1922 (the sixty-seventh since 1848) contained only four fascists out of fourteen members, and that one member, even, of the dismissed Facta cabinet, continued in office. It was not until 1925 that the now familiar unparliamentary dictatorship became definitely established. Mussolini had seized power with the connivance of the king of Italy (after which his erstwhile vehement republicanism was heard of no more) and he took the trouble to secure from the Italian parliament a regular vote of full powers for a year, and, a little later, to persuade it to assent to its own dissolution and the holding of new elections before its full term had expired. Not until the beginning of 1925, when the ugly incident of the Matteotti murder of 1924 had more than dissipated that appearance of general domestic support for the *régime* that had been inspired by the national appeal of the strong-handed policy of the Corfu incident, did Mussolini (whose contempt for parliamentary institutions had long been undisguised) announce himself prepared to maintain himself and the Fascist party in power by force if necessary. If general popular support could not be secured, then the governing *élite* would dispense with it in the interests of the people themselves. Here was a new despotism,

TRANSITION TO  
DICTATORSHIP

professing great benevolence, but by its very terms of reference repudiating the political organization of the nation-state set up during the century following the French Revolution. Mussolini's speech of January 3, 1925, made all this perfectly clear, and effectively burned the boats by which he had crossed his second Rubicon.

The type of state produced by the American and French revolutionary stimulus was repudiated, but the state as such (in strong contrast to the bolshevist attitude in Russia) was not to be regarded as a waning phenomenon, but as something to be revived and glorified. "Everything within the state. Nothing outside or against the state", cried Mussolini on May 26, 1927, showing how far he had come since writing in the *Popolo d'Italia* on April 6, 1920; "Down with the state in all its forms and incarnations. The state of yesterday, of today and of tomorrow", and professing his adherence to "the ever-consoling religion of anarchy". But the state he had permitted to survive was not the state of struggling parties, changing leaders and popular control, it was a state that was identified with one dominant party, whose leader was also the unchanging head of the government of Italy, and to whom every party member, indeed every citizen, was to give unquestioning obedience. If the bolshevist system in the U.S.S.R. and its constituent republics had tended to take on the character of a "collective party dictatorship" the fascist system in

A "PERSONAL  
PARTY DIC-  
TATORSHIP"  
SET UP

Italy was a "personal party dictatorship", for no one man, not even Lenin before 1924 or Stalin since 1927, has ever completely transcended the principle of government by committee (small as the effective membership of the ruling committee may at times have been) on which the soviet system is based, but Mussolini has effectively kept that principle at arm's length. Even the Fascist Grand Council has become no more than "A field-marshal among sub-lieutenants", and ministers of state have

been told by the *Capo del Governo* that they too were to regard themselves as soldiers, subject only to his martial law and ready to receive marching orders at any moment. Fascists existed only to toe the party line that he drew. Since the beginning of 1925 Mussolini has always made this abundantly clear. A veiled dictatorship is as alien to him as is false modesty.

But, if in the interests of an omnipotent Hegelian state, a Nietzschean superman, aided by a Sorelian mythology and a Paretonic *élite*, pursues a Machiavellian policy, he still cannot do without institutions, even if he can dispense with principles, especially if his state contains some forty million inhabitants. He can rule through the institutions he finds already in existence, he can adapt these to his own ends or he can abandon them altogether in favour of new ones. Mussolini has created the fascist state in Italy by a combination of the second and the third alternatives.

ADAPTATION  
AND  
INNOVATION

The *Statuto* was left unrepealed, the monarchy, the Senate and the Chamber of Deputies continued to exist, but alongside them appeared not only the complete hierarchy of the Fascist party, membership of which became necessary for the holding of any public office, but also a reorganization of society on a politico-economic basis, in which the citizen and the producer were merged together as completely as the party and the state, and, finally, a co-ordinating body of the *élite* of the *élite* (the Fascist Grand Council) to act as a switchboard for the *Duce* and *Capo del Governo* in his task of controlling and keeping in touch with the various parts of the system and of retaining "everything within the state".

A constitutional commission was appointed in 1924 to refashion the Italian state on a new basis, but its report was not acted upon (and then only to the extent that the *Duce* chose) until the corporative system was set up in 1926-27.

"AD HOC"  
MEASURES

Meanwhile the more practical *ad hoc* measures were adopted

of reforming the electoral law, in 1924, so that a working majority was assured to any party that could secure a bare majority of parliamentary seats (and this, after October 1922, could always be expected to be the Fascist party), and of passing a law, in 1925, declaring the head of the government to be responsible only to the king (a nominal responsibility to replace his previous actual responsibility to parliament, and a return to the letter of the *Statuto* of 1848 away from the libertarian spirit in which it had latterly been interpreted). By the beginning of 1926 laws had also been passed curbing the freedom of the press, curtailing civil and political rights in certain circumstances, limiting the initiative of state officials and permitting the government to issue "judicial rulings". The prerogatives of the executive and the legal powers of the Prime Minister were now wide enough for all eventualities. The concentration of portfolios in the hands of the Prime Minister and the rapid turnover in the personnel of the remaining members of the cabinet, were further signs of the impregnable position he had created for himself within the legal structure of the existing Italian state.

The years 1926 to 1928 saw the juridical creation of the new corporative system of representation and negotiation based upon economic categories, to replace entirely "the lie of universal democratic suffrage" (as Mussolini called it in 1927), and also the legal recognition of a body (the Fascist Grand Council) that had existed extralegally since 1923 to implement the position of the Fascist party as "the incarnation of the state". A new national type of syndicalism was evolved, in which the rights of syndicates replaced those of individuals and the citizen was merged in the producer, though the state remained omnipotent. The Charter of Labour of 1927 repudiated the theoretical equality of all citizens and classified the population in its new economic categories, which had

THE CORPORATIVE STATE.  
NEW ECONOMIC CATEGORIES

been defined by the trade union or syndical law of 1926 and its implementing decree. Employers and employees had their separate syndicates, each organized nationally, in six different categories (later reduced to four), and intellectual workers who were their own masters were put in a special category. Each of these thirteen (later nine) national confederations of syndicates had its general council. Working conditions and wages were to be settled by conferences between the employers' and employees' local federations or national federations of syndicates, with the state as final arbiter, and special courts were set up to deal with labour disputes. Strikes and lock-outs were both absolutely prohibited. All workers and employers had to contribute to their syndicates, whether active members or not, but to be active members they had also to be members of the Fascist party. A Ministry of Corporations was created to watch over the working of the system.

This new industrial organization was welded into the state political machine by the electoral law of 1928. The general councils of the thirteen national confederations of syndicates were jointly to ELECTORAL  
LAW OF 1928 present eight hundred candidates for the Chamber of Deputies, and other selected public bodies two hundred. The Fascist Grand Council was to select four hundred of these (though "men distinguished in the Sciences, Letters, Arts, Arms or Politics" could be chosen from outside the list) for submission to the electorate voting in one nation-wide constituency for or against the whole unsplittable list by a plain "Yes" or "No". Should the official list be rejected, a new election was to be held with a fresh list, while additional lists could be submitted by groups of electors, but these two last provisions belong rather to the theory than to the practice of the fascist state. "My Fascist friends grin", reports Finer, "when I ask them what would happen if competing lists were presented. Indeed, such a thing is unthinkable." This



machinery is rather like carrying an extra watch whose hands revolve anti-clockwise, in case the earth should reverse its direction of spin one fine night.

The national electorate was adapted to this new system by being composed of male Italian citizens over twenty-  
THE NEW  
NATIONAL  
ELECTORATE one years of age (or over eighteen if married men, or widowers possessing children) who had paid their syndicate dues. The general council of each of the thirteen national confederations of syndicates was also empowered by the electoral law of 1928 to nominate one member for the Senate, but actual appointment still rested with the king, on the advice of the *Capo del Governo*. Local elections and the old local elected bodies having entirely disappeared throughout Italy by the end of 1928 (the provincial prefect and the communal *Podesta* now administering local affairs as the appointees of the central government, to which alone they were responsible), there was no need to adapt these to the new scheme of representation.

A working structure was now complete. It could hardly be called a logical system, but it was one that suited the *régime* admirably. The crown had permitted itself to be a fascist instrument from the first, the Senate had been rapidly transformed into a purely fascist body without radical change in its constitutional position being necessary, the Chamber of Deputies was now entirely composed of hand-picked fascist delegates and was reduced virtually to the mere ratification of the legislative decisions of the government (a law on parliamentary business, in 1929, severely clipped the wings the Chamber had already long since ceased to use). A citizen could only vote if he fulfilled some recognized social function (the badge of which was membership of a syndicate) and could only be active in politics if he was a member of the Fascist party. The *Duce* of the party was also the Prime Minister of the state, and the Fascist Grand Council further served to co-ordinate party and state, its functions including not

only supreme control (under the *Duce*) of the Fascist party, the appointment of the party's highest officials, and the selection of the party list for election to the Chamber of Deputies from the nominations submitted to it, but also, as a council of state, the right to be consulted on all questions of a constitutional nature, and to propose to the king the name of the new *Capo del Governo* whenever one should be needed. Its personnel includes the leading members of the party and of the government, the heads of the corporative organizations, the presidents of the Senate and Chamber and Royal Academy of Italy, and the commander of the militia; "Thus", concludes Finer, "the Grand Council stands at the very centre of the State and the Party. It is linked with the Council of Ministers, with the Chambers, with the Constitution, with the leaders of the Party and through them, with the fact that they have to follow the general policy laid down by the Grand Council, with all the outlying agents of the Party in all its forms, propagandist, repressive and charitable."

THE FASCIST  
GRAND  
COUNCIL

Armed at last with an institutional organization of the administration, co-ordination and means of perpetuating the fascist state, its *Duce* and *Capo del Governo* could turn to fresh fields. At the very beginning of 1929 came the *Concordat* with the Papacy and the recognition of the separate sovereignty of the Vatican City State, the greatest triumph of the *régime* since its inception, followed by the lean years of the world depression during which, though "the battle of the grain" (the achievement of self-sufficiency in this important direction in normal years) was won, the "battle of the lira" was lost, and then by the acceptance of the implications of a more active foreign and colonial policy than had hitherto been adventured. Since 1929 the *régime* has tended to leave alone the fundamentals of its institutional organization in the midst of these wider preoccupations, though

detailed experiments and changes of some moment have been carried out in the sphere of government. The corporative system was crowned by the creation of a National Council of Corporations in 1930, presided over by the head of the government himself, and to meet periodically, a permanent central corporative committee to facilitate the conception and execution of a planned economy for Italy and aiming at a greater degree of self-sufficiency. Though it was hinted by Mussolini that this council might some day take the place of the obsolescent Chamber of Deputies ("The Chamber of Deputies has never pleased me", he said as late as 1933, by which time it had become as subservient as he could ever wish it to be), yet the regular quinquennial plebiscite-election of a new Chamber was allowed to take place when it fell due in 1934. It proved to be the last, for a new "Chamber of Fasci and Corporations" with a membership of 600 deputies has already replaced it. The corporate hierarchy was subjected to re-classification in 1934 when the "old corporations" (conferences between the employers' and employees' confederations) established in 1927 were replaced by the "new corporations" (twenty-two categories of productive activity, each embracing every process in one field of production; for instance, cereal production, paper and printing, or the theatre) — in which, as far as possible, the interests of employers and employed are considered together and not separately, and the general welfare of the industries concerned above that of either, though still below that of the state, which, without ceasing to be final arbiter and director of all productive activity, nevertheless (perhaps driven by the very complexity of the new system) tends to recede ever so slightly into the background of the ordinary activities of the corporations and to experiment with the possibilities of remote control.

THE NATIONAL  
COUNCIL AND  
REORGANIZA-  
TION OF  
CORPORATIONS

When the Italian fascist state is looked at in per-

spective it is not the establishment of a dictatorship or the personality of the *Duce* and *Capo del Governo* that give it its special place in the history of government; it is not the way in which power was seized, existing institutions made use of, and policies pursued with open opportunism; nor is it the striving for self-sufficiency and empire that are memorable. Many analogies, ancient and modern, can be found to all these aspects of Mussolini's Italy. The primary significance of the Italian fascist state lies in the fact that, at a moment when the world was growing distrustful of the machinery of political democracy as a means of achieving the complicated politico-economic ends of modern society, yet recoiling from the holocaust of all the institutions and concepts with which it had grown familiar that the bolshevist revolution in Russia held out as a solution, it was offered in the fascist reorganization of Italy a compromise between these two ideologies that, unlike many compromises, appeared to be organizing and directing human endeavour with all the vigour of the one and more than that of the other. Much of the fascist revolution was unique and Italian in character, but much else had a wider significance to a troubled and chaotic world, particularly because it was presented less as the triumph of a deep-laid doctrine of social regeneration than of a spontaneous movement of social disgust and action. Fascism spoke in words of one syllable and of primeval appeal. It treated man not as he might be but as he was. Here at last was an "ism" without metaphysics.

Fascism was the penultimate deviation from the traditional line of the democratic state for those who shrank from that ultimate deviation which the soviet solution implied. Deviations of varying degrees had been made almost everywhere, from the organization of political parties on a more and more economic basis and the appearance

ITALIAN  
FASCIST  
STATE IN  
PERSPECTIVE

A COM-  
PROMISE AND  
A REVIVAL

of social "class" parties (as in Great Britain with her Labour party), to the reform of representation to allow professions, trades and other economic and social forces to be directly represented in legislative chambers (this idea, at least as old as Bonaparte's constitution of 1799, was adopted by the Irish Free State in a mild form in 1922, some months before the march on Rome), and then to the establishment of economic councils or parliaments of industry alongside traditional political institutions (advocated by the Webbs and others for Britain, and actually attempted in the German Weimar constitution of 1919). The Russians had jumped two steps onward from this to the abolition of political institutions altogether, in favour of a purely economic organization of society based upon the doctrine of the rule of one class alone, the labouring and, hitherto, exploited masses, but the next step in the right order was the giving over of political institutions entirely to an economically organized and socially representative state, which should dominate all classes but destroy none. This was what fascism did in Italy. An authoritative tradition that the success of the ideas of the Dutch, English, American and French revolutions of the sixteenth, seventeenth and eighteenth centuries had caused to become almost completely submerged by the end of the nineteenth century, was now once again brought to the surface.

The collectivist trend in detailed legislation that had been discernible in many countries since the eighteenth

THE GENERAL  
COLLECTIVIST  
TREND

seventies, had long been bursting out of the framework of political constitutions framed in accordance with the ideas of eighteenth

and earlier nineteenth century individualism. New government departments for specific economic and social purposes (health, agriculture, labour, mines, trade, transport) had to be created everywhere; Bismarckian Germany set the pace in the new governmental paternalism, with its insurance and pensions schemes; even

the right of property was not so sacrosanct as heretofore, when death duties were imposed, the unearned increment was punitively taxed, the mineral resources under the soil were claimed by the state and compensation for land expropriated by the state was not always given. The compulsory socialization of industry was advocated, but nowhere outside the Soviet Union was it carried far, though the German Weimar constitution provided machinery to this end. New politico-economic theories of the state emphasized this new trend when state socialism claimed that the political state should control every phase of economic life, guild socialism advocated a devolution of economic control and the retention of the central machinery of the state for political purposes only, and syndicalism demanded the complete abolition of all political organs and their replacement by a purely economic organization of human activities. Guild socialism never advanced beyond a tentative stage, but state socialism and syndicalism both became formidable alternatives to the organization of the purely political expressionism of the libertarian state. The great question was whether the political organs of the state were capable, in any recognizable modification of their existing forms, of dealing with the new collectivist activities of the state, and, if they were not, whether new economic organs could be dovetailed into the state alongside them without causing impossible friction. A division of a still-vaunted sovereign power between, say, a political and an economic parliament, was generally recoiled from. When the opportunity for thoroughgoing reorganization was provided in Russia, new economic organs completely overwhelmed existing political organs (such as they were), the traditional political organs emerged pre-eminent in Germany after considerable hesitation (though a gesture in the other direction was made), while in Italy the corporative state was devised (though perhaps not

REACTION  
AGAINST  
DEMOCRATIC  
FORMS. ITALY  
AND RUSSIA  
COMPARED

deliberately) as a compromise between the two, produced by a conjunction of elements of economic syndicalism and guild socialism with political nationalism of an intensive brand.

Because the inadequacies in the economic sphere of the politically organized state came to be realized to the full at a time when the accepted form of that state was a representative democracy based upon the majority principle, with policies emerging from the conflicts of political parties, the new politico-economically organized states sought to break away from this form, setting up

AUTHORI-  
TARIAN RULE  
OF A MINORITY  
OF "ACTIVE  
CITIZENS"

in its place the authoritarian rule of a minority of "active citizens", with representation springing from economic categories, and the conflict of parties entirely taboo. Russia with her Communist party,

her soviets and her categorical planning, and Italy with her Fascist party, her syndicates and her corporate hierarchy both cast entirely adrift from the democratic tradition, and adopted machinery (in the one to replace and in the other to supplement that of the political state) bearing many superficial similarities, though animated by very different motivating forces. It was as much this reaction against democratic forms and ideas that they possessed in common, as their respective and widely differing conceptions of the proper ordering of society on an economic basis, that made their impact upon the science and practice of government of primary significance, and where their influence has been in a common direction it has been correspondingly stronger than when they have pulled in opposite or at least in different directions. The authoritarian tendency that is discernible in both has sponsored a world-wide reaction against democracy, but by no means every government that has implemented such a reaction has proceeded either to the soviet or to the corporative extreme. The compromise implied in the latter has made it easier to apply it outside Italy

than has been the case with the former outside the Soviet Union and it has undoubtedly become the most powerful alternative to political democracy that the world has produced since the general acceptance of that form. The degree of originality in the concept of the corporative state is of no great relevance beside the fact of its great appeal to rulers and peoples distracted by economic upheavals beyond either their control or their comprehension. The corporate clauses of D'Annunzio's highly flavoured constitution for Fiume of 1919 may have been the germs of Mussolini's corporative state, just as the projects of Robert Owen may have been those of the soviet system, but it was the organization of all Italy and not merely of the Carnaro in the case of the one, and of the whole Soviet Union and not merely of New Harmony in that of the other, that gave them their worldwide significance and appeal. The appeal of the Italian solution has tended to be wider perhaps because the terms of that solution were more vague. Its adoption implied the acceptance of a programme of action based upon a conglomeration of somewhat miscellaneous principles, many of them deduced *ex post facto* from the results of successful opportunism. The adoption of the soviet way, on the other hand, involved the digestion of a definite and recondite body of doctrine, not always easy to grasp and made harder by the complicated explanations and counter-explanations of some of its expositors, with few picturesque touches to ease the way, even if something more solid and more fundamental was the reward. Political democracy having exhibited its deficiencies, a dyspeptic world was presented with the dilemma of the patient who, having lost faith in the old family doctor, finds that the available alternatives seem to be a veterinary surgeon who offers him a horse pill, and a fashionable quack who tells him to buy a new suit and a fast car and go and find a nice place in the sun.

The benefits to Italy of sixteen years of fascist rule



SIXTEEN  
YEARS OF  
FASCIST RULE  
IN ITALY

are claimed by its admirers as stupendous and by its detractors as dust and ashes. While some point to the draining of the marshes, the *autostrada*, *dopolavore*, the battle of the grain, the *Rex* and the floodlighting of the Colosseum, others prefer to dwell upon wage-cuts, capital levies, continued illiteracy, the failure to improve appreciably a low standard of living, the continued existence of the colony of abandoned cats in the Forum of Trajan . . . and the Lipari Islands. It is all a matter of what matters most to a person. For those who are happy so long as there are plenty of circuses and enough bread to keep body and soul together, and to whom the unaccustomed thrill of arriving on time makes them indifferent to where they are going, Italy must be a far pleasanter place in which to live now than it was in 1922, and such people may well constitute the greater part of her population. But whether it be good or evil, fascism is the most significant thing in Italian history since the *Risorgimento*, and perhaps more significant still in the history of the world.

The excitement which the successful establishment of the fascist dictatorship in Italy caused throughout the world can only be compared with the welcome given to the principle of legitimism a hundred years earlier by a world thoroughly scared and disturbed by the Jacobins. It was not long before this resurgence of autocracy in the land of Rienzi, Mazzini . . . and Giolitti, showed the way to others. As early as 1923 anti-democratic movements attempted to seize power in two leading European states, Germany and Spain, the first of which was a democracy in every sense of the term and the second of which was, on paper at least, a libertarian constitutional monarchy with many democratic features. The beer-hall *Putsch* of Hitler and Ludendorff in Munich was abortive, and Adolf Hitler went to prison to write the first volume of

FASCIST  
TENDENCIES  
ABROAD —  
SPAIN

*Mein Kampf*, but in Spain General Primo de Rivera, Marquis of Estella, became Prime Minister, and with the machinery of government in his hands (and the connivance of the king) overthrew the constitution of 1876 and instituted an authoritarian *régime*. More traditionalist, less constructive, much more crude and far less astute than Mussolini's rule in Italy, Primo de Rivera's government of Spain had absolutely no popular appeal and made no very strong effort to put itself on a broader basis. It was an absolutist reaction against the demand that the implications of a constitutional monarchy should be honoured in Spain. Looking backwards rather than forward, it was not interested in creating a corporative state or indeed in improving the chronically inadequate economic organization of Spain in any way. It certainly built roads, the obsession of every dictator, but it did not raise the prestige of Spain in the world by one jot or tittle, and it reduced rather than improved the standard of living. Its stability suffered from Primo de Rivera's vacillations as between a purely military and administrative dictatorship, and one which should work behind a façade of popular institutions. His nominated parliament shocked the ultra-reactionary king by its liberalism, but satisfied no popular demands whatsoever, and he was dismissed (he had never sought to consolidate a personal dictatorship) in 1930. The monarchy, having deserted this one last sincere attempt to

FALL OF THE  
MONARCHY

save it, survived barely a year longer, and in 1931 Spain's second republic produced her sixth constitution since 1812. In the teeth of all authoritarian trends this was a democratic constitution in the libertarian tradition, though lacking most of the devices of direct democracy. Universal manhood and womanhood suffrage appeared in Spain for the first time; the single-chambered *Cortes* was virtually a sovereign body, though the President (whose powers were few, whose election was indirect and whose veto was merely suspensive) or the

Prime Minister (whose ministry was collectively and legally responsible to the *Cortes*) could, in certain circumstances, demand its dissolution; no functional representation was provided for, but a very large measure of devolution was made possible in the cases of those provinces which desired autonomous *régimes*, for they could adopt in their local statutes any powers not specifically reserved to the central government, and both Catalonia and the Basque provinces took advantage of this arrangement. From the politico-economic point of view this was a middle-of-the-way constitution, but while any recognition of the dictatorship of the proletariat was avoided in this "democratic republic of workers of all classes", the economic and social rights and duties of the citizen stated in it went far beyond the earlier type of political declaration of rights, and showed the influence of the Mexican constitution of 1917 and the German of

DEMOCRATIC  
SPANISH  
CONSTITUTION  
OF 1931

1919. In other directions the most striking features of the Spanish constitution of 1931 were its complete secularization of the state and of education ("The Spanish state has no official religion") and its recognition of the principles of international co-operation and arbitration ("Spain renounces war as an instrument of national policy"). The constitution was skeleton scheme rather than a complete system of government and left a great deal to be dealt with by implementing legislation, and while the government of the left which came into power in 1931 achieved much (the reorganization of the army, the setting up of schools, the reduction of working hours, the provision of public works projects to reduce unemployment, for instance), it had not been able to deal adequately with the basic problem of agrarian reform (where opposition from vested interests was fiercest) before the right opposition succeeded in forming a coalition that won the election of 1933. The government of the right remained in office until 1936, respecting the letter of the legal

institutions of the new republic, but hardly interpreting them in the spirit of their framers, and it was able to stonewall the bulk of the great programme of social and economic reorganization that had been framed in 1931. So long as this government of the right and centre was in power the forces of extreme reaction contented themselves with constitutional forms of agitation, but the parties of the left succeeded at last in presenting a united "popular front" in the elections of March 1936, and after a hotly and closely contested campaign, managed to secure (despite the advantage possessed by the government of the right and centre of ordering and supervising the elections) a clear majority (285 as against 192 of the right and centre combined, including the Catalan League) of the seats in the new *Cortes*, though (such were the vagaries of the "weighted" electoral system, which provided multi-membered constituencies but no proportional representation or second ballot) the popular front only appears to have secured the barest majority (four and a half million as against four million, three hundred thousand) of all the votes cast in the country. Refusing to accept this constitutional defeat (indeed it was alleged to have been the result of trickery and intimidation and not a true representation of the feeling of the country) and fearing that the new government of the left coalition would now complete the reforms interrupted in 1933, the parties of the extreme right engineered the armed rebellion of July 1936, the spasmodic successes of which produced a stalemate that plunged Spain into yet another of her interminable and savage civil wars, from the outcome of which (what and whenever that may be) a settled and constitutional form of government can hardly be expected to emerge for a long time to come.

REACTION  
AND CHAOS  
IN SPAIN

The crude and unimpressive absolutist reaction in Spain under Primo de Rivera could hardly be expected to find ready imitators, and even the far more subtle

and energetic dictatorship of Mussolini and the Fascist party in Italy was labouring through heavy weather which made the world seriously doubt its ability to survive much longer, until the strings of government were pulled tighter in 1925, and the construction of the new institutions of the corporative state embarked upon in 1926. It is therefore not without significance that the year 1926 was the first in which the new authoritarian trend appeared to be making headway among the states of Europe outside Italy and Spain (the Balkans, always a law — or lack of it — unto themselves, excepted). Then came a minor deluge. First, Pilsudski's *coup* in Poland in May 1926, resulted in a considerable strengthening of the executive and greatly weakened the power of the legislature in the state, though constitutional forms

FASCISM IN  
PORTUGAL

continued to be observed ; then Portugal, having passed rapidly from crisis to crisis ever since the republican and democratic constitution of 1911 had been promulgated, saw a military clique under Mendez Cabecadas force on May 30, 1926, the dismissal of a government possessing the confidence of the legislature and the resignation of the regularly elected President of the republic (an ominous parallel with events in Poland). Cabecadas as Prime Minister having assumed (as the constitution of 1911 provided) the President's powers pending the election of a fresh President, he dismissed the legislature (which, also under the constitution of 1911, chose the President of the republic) for an indefinite period, thus paving the way for decrees whereby General Carmona became provisional President (June 29 and December 26, 1926) and consequently for the continued (and formally legal) concentration of all power in the state in the hands of himself and his clique. A revision in 1928, by decree, of the machinery for electing the President of the republic (whereby he was to be chosen directly by popular plebiscite) made it possible for the provisional presidency

to be ended and for Carmona to present himself to the people as candidate for the regular presidency for a term of five years. His election was a foregone conclusion, as also was his re-election in 1935, the personnel of the government having been reshuffled in 1932 as a national *régime* representing the *Estado Novo*, and the new constitution of March 19, 1933, issued. But the nature and extent of the dictatorship were not fundamentally altered; the expected corporative state has still to come to fruition, though the constitution created a corporative assembly as well as a one-party legislature; the chief development has been a tendency for Dr. Salazar (who became Prime Minister, Minister for War and Foreign Affairs, as well as Minister of Finance, in 1936), to dominate the government, and for the *régime's* undisguised admiration for the methods of the more important fascist governments to weaken Portugal's ideological (and to a smaller extent her economic) dependence upon the libertarian countries, and Great Britain in particular. The Cabecadas-Carmona-Salazar executive dictatorship has given Portugal more than a decade of unwonted governmental stability, but as yet Portugal is a corporative state by profession rather than by achievement. Whatever tendencies her government has recently shown appear to be in the Latin American rather than in any European tradition.

Italy, Portugal, and, to a qualified extent, Poland and Lithuania, had all turned away from the libertarian tradition to a more authoritarian solution of their governmental problems before the end of 1926, but the reaction made little more headway until the world depression which ushered in the nineteen thirties introduced a new factor which sent a further group of states (Latvia, Esthonia, Austria, Brazil, Greece, Bulgaria, Rumania, not to mention Germany) headlong into the authoritarian fold. Indeed, the late nineteen twenties saw a fresh warming of hands around the fires of democracy. The Locarno-Stresemann

DEMOCRATIC  
COUNTER-  
ATTACKS

era of good feeling seemed to be giving the German Weimar republic at least an even chance of permanent survival (the odds had always appeared to be against it until then); Great Britain underlined the voluntary nature of her "Commonwealth" by the Imperial Conference formula of 1926, completed the structure of her universal franchise by the law of 1928, put finishing touches to her reorganization of local government in the law of 1929 and in the same year saw her second labour government take office without the sky falling in ruins or a serious fascist opposition materializing; the U.S.S.R. abandoned world revolution for "socialism in one country only" and exiled Leon Trotsky; in China the Kuomintang broke with the Comintern and the Three Principles of the People promised a bigger and better democracy to all; even in Poland the vigorous though disjointed opposition of a majority of the people's representatives continued to try, without quite exhausting, the patience of Joseph Pilsudski. It is true that one president (Zog of Albania) in 1928 turned himself into a king, a truly Balkan gesture in an age which had come to look upon kingship with pity rather than with envy, but, on the other hand, even Greece seemed to be settling down to complete the structure of her democratic republic, proclaimed in 1923, for (after the slight interruption caused by General Pangalos in 1926) she produced a new constitution in 1927, re-established her council of state in 1928, reformed her Senate (introducing a modicum of professional representation) in 1929, and allowed women over thirty years of age to vote in municipal and communal elections in 1930.

The only fresh gap of any importance to appear in the libertarian front before the end of the nineteen twenties came out of the blue on January 5, 1929, when King Alexander I of the Triune Kingdom of the Serbs, Croats and Slovenes, by royal proclamation suspended the constitution of 1921 and dissolved the legislature. Laws were in future, he announced, to be promulgated by

royal *ukase*. He explained that his action was prompted solely by the urgent need to preserve national unity and order, which the violent party strife and the unruliness of the legislature had jeopardized, but he affirmed that parliamentary government remained his ideal. The new dictatorship was rapidly cemented by a series of laws and decrees. The ministry was to be chosen by the king and to be solely responsible to him ; a supreme legislative council, with purely consultative functions, and nominated by the Minister of Justice, was to assist in the preparation of laws ; the official name of the country was changed to Yugoslavia and the thirty-three departments into which the state had been divided in 1921 for local government purposes were replaced by nine provinces, each corresponding roughly to one of the historic divisions of the country and each under a governor or *Ban* appointed by the king. For two and a half years the government of Yugoslavia was pure autocracy, but apart from the attempt through the change of name and reorganization of local government to give the country true unity and to heal some of the chronic divisions among its various peoples, no radical changes were made. King Alexander apparently pinned his faith upon the value of a holiday from party and legislative squabbles, and, in September 1931 he officially ended the dictatorship by proclamation, and at the same time presented a new constitution to his country, to replace that of 1921. Though guaranteed rights, parliamentary institutions and the universal franchise were restored, this *charte octroyée* was in the true legitimist tradition. Legislation was declared to be the joint function of king and legislature, and he possessed an absolute veto ; the ministers were responsible only to the king. There was not the sign of a gesture in the direction of the corporative state. Institutions remained purely political in nature. But it was equally certain that the marked democratic tendencies of the constitution of

AUTOCRACY IN  
YUGOSLAVIA,  
1929-1931



1921 (though they had been less strongly marked than in any other new or transformed state of the time except Hungary) had been sacrificed on the altar of strong government; that the executive was to dominate the new constitution and the king the executive. The constitution of 1921 had been drawn up and adopted by the representatives of the people and then confirmed by the king; that of 1931 was given by the king to the country by proclamation. Article 1 of the constitution of 1921 had declared "the state of the Serbs, Croats and Slovenes is a constitutional, parliamentary and hereditary monarchy", but article 1 of the constitution of 1931 reads "The kingdom of Yugoslavia is an hereditary and constitutional monarchy". The difference between these two forms is pregnant with significance.

The assassination of King Alexander in 1934 brought into operation the elaborate provisions (section six) of the constitution of 1931 with regard to a regency during the minority of his heir, but the regency has not yet seen fit to modify the bases of his semi-authoritarian *régime*, despite many expressions of dissatisfaction.

When a country such as Portugal or Lithuania takes an authoritarian turn the world may take little notice,

GERMANY  
FASCISM'S  
GREATEST  
PROSELYTE

but if the country is Poland or Yugoslavia it is at least news. Should it be Italy it is front-page news, but when Germany goes the same way it is nothing short of *epochemachend*. The authoritarian *régime* and the fascist corporative state attracted wide attention during its first decade, but people were apt to shrug it off as "How very — how typically Italian!" The ragtag and bobtail of minor countries to which emulation of Italian example appeared to be confined during that decade, did not add to the impressiveness of the fascist experiment as a world force. The whole thing was looked upon as interesting but slightly nondescript. But when an unquestionably great power, great even in the aftermath of defeat in war

and humiliation in peace, whose people possessed a culture second to none and emulated by most, and whose administrative, educational, public health, social insurance, and communications systems (only to begin the list) were outstanding, embraced with apparent fervour the doctrines and the domination of a self-designated *élite*, which based its appeal neither upon aristocratic caste nor upon intellectual pre-eminence, neither upon the once accepted divine right of hereditary monarchy nor upon the recently available rights of a sovereign people and the rule of the majority, then the world had to be duly impressed by the authoritarian reaction. "What is there in this fascism (by whatever name it is known) that it can enmesh and enchant such a people in such a way?" is the obstinate question that inevitably replaces earlier shrugs.

Such a question cannot here be answered. Many aspects of the ideas and methods of Adolf Hitler and the National Socialist German Workers' Party cannot be touched upon in a brief indication of their connection with the authoritarian reaction and the rise of fascism elsewhere, and of the result of their impact upon the constitutional system and governmental structure of Germany. The details of their long drawn out struggle for power, of their unique and overwhelming propaganda, of the ineptitude of those who might have stopped or diverted them, of their heady triumphs when at last Germany lay at their feet, of six years of domestic, foreign and economic policy inspired by a breathtaking singleness of purpose and carried through with an unexampled resourcefulness of means . . . all this, and more, must be left aside. To ignore the biology and to concentrate upon the anatomy of the German Third Reich may confine investigation to the bare bones of the structure, but it should also restrict it to the safer ground of the shape of things that are rather than of things to come.

THE THIRD  
REICH

The National Socialist German Workers' Party was

founded in 1919, the same year as the *fasci di combattimento*, and Adolf Hitler was not its original leader and founder, but the seventh member admitted to the party. Nor was he the author of the party's programme of twenty-five points drawn up by Gottfried Feder in 1920. Adolf Hitler was not a renegade socialist; he had never been a trade union member, had never engaged in proletarian journalism, had never dabbled in syndicalism or anarchism; he entered the new party from total obscurity. An Austrian by birth and a Great German by conviction, he had entered the army of the German *Reich* in 1914, had risen to be a corporal, had been decorated with the Iron Cross, had been wounded, gassed and disillusioned. Outwardly there was little to distinguish him from the typical German or Austrian man in the street when he returned to Munich to pick up the broken threads of his life . . . and failed to find any until the N.S.D.A.P. absorbed him. But he was not to absorb the party as his own for the better part of a decade, and the party was not to absorb Germany as its own for the better part of another. Not until 1926 (after the fiasco of 1923, after his imprisonment, after he had written the first part of *Mein Kampf*) did he become the unquestioned leader of the party. Not until 1933 did the party succeed in identifying itself and its *Weltanschauung* completely with the German state, to the exclusion of all other parties and ideas. Not until fourteen years after the foundation of his party did he become *Reichskanzler* as well as *Führer*. Mussolini was *Capo del Governo* as well as *Duce* (which he had been from the start) in less than four.

This decade and a half of frustration profoundly affected both Adolf Hitler and his movement. Had they come into power in 1923 before *Mein Kampf* was set down on paper, or in 1926 before the twenty-five points were declared immutable, or even in 1929 before Brüning and Papen had demonstrated how easy it was to suspend the working of the libertarian Weimar constitution in

any desired direction without fear of effective defiance from the German people ; had Hitler not been rejected as a candidate for the German presidency, and had not his party suffered an electoral set-back as late as November 1932, the Third *Reich* might have been rather different in form and policy from what it has become since January 1933. Originally the N.S.D.A.P. was as amorphous as the Italian Fascist party itself (the very name is an indication of this) ; Hitler and Ludendorff were strange bed-fellows to be associated in the *Putsch* of 1923, and the names and occupations of those party members who were killed on that occasion, that Hitler records in *Mein Kampf* (which he dedicates to their memory) give an idea of the miscellaneous nature of its appeal in those early days. A party in power does not need a political bible half so much as one struggling for power — indeed it often finds it convenient even to forget the details of its last campaign platform — and the Italian Fascist party came so quickly to power that it has never bothered about a *Weltanschauung*, but *Mein Kampf* gave German “MEIN KAMPF” National Socialists something concrete to adore as well as to aim at, and the twenty-five point programme (out of date as it had become in certain directions even by 1926) provided them with a plan without which they would, as good Germans, have felt, while still in opposition, completely lost. It was no good crying “*Deutschland Erwache !*” if the new day was not to be a full one. The splendours of the dawn might be enough to get an Italian up and about, but a German wanted to know in advance what he was to be expected to do at ten-forty-five, at thirteen-fifteen and at nineteen-thirty o'clock, and precisely when he could expect his second breakfast.

Thus, when the National Socialists found themselves at last in the promised land at the beginning of 1933, they not only had a most elaborately organized party system, built up through long years of effort, but also

a detailed plan of procedure for the regeneration of Germany, the execution of which would absorb all their energies

THE NATIONAL  
SOCIALIST  
MOVEMENT

for some time to come, and, to crown all this, they had been vouchsafed an apocalyptic vision of what was to be the result of it all for them, for Germany and for the world. The speed with which Germany was completely transformed by the National Socialists contrasts strikingly with Mussolini's first three years of fumbling with the Italian situation between the end of 1922 and the end of 1925, but on the other hand there had been little fumbling on Mussolini's part between 1919 and 1922 and a great deal on all sides, including Hitler's, in the Germany of the Weimar republic. The contrasts between the two movements are many, and continue to grow wider, but nevertheless their fundamental similarities are extensive enough to put them in the same historical and governmental category, remembering always that the one had the great advantage of profiting from the errors as well as from the successes of the other.

Hitler, like Mussolini, first became head of the government at the summons of an unenthusiastic head of the state, who could, nevertheless, find no more palatable alternative; like the Italian Fascists, the German National Socialists had at first only a minority membership of the coalition ministry headed by their leader; like them also they came to power in alliance with some people they despised and others that their programme had attacked, and were cramped by this alliance with Hugenberg monarchists and big industrialists. Once in power (and more rapidly than the Italian Fascists) they too thrust aside their political, though not their economic allies,

DEBT TO  
ITALIAN  
FASCISM

suppressed all parties but their own (the big industrialists were wisely not organized as a party and escaped this purge), demanded and received from the legislature full powers for a stated period (four years instead of one), forced a dissolution

and then a suspension of the activities of the lower house, abrogated those parts of the existing constitution to which they objected, without troubling formally to set it aside, eliminated from the civil service and from public life all those suspected of unfriendliness toward the *régime* and as many of those who were not its active adherents as would provide the places demanded by those who were, proclaimed the state as omnipotent and identified their party organization with it. These were the foundations, but the decorative side of the new era was also cast in a derivative mould, and much of it (the shirts and the salutes) had been so for years. Youth organizations, women's organizations, the cult of *Kraft durch Freude* (so reminiscent of *Dopolavoro*), grandiose schemes for motor-roads, munificent subsidies for motor-racing, and much else beside seemed to strike familiar chords, though, as befitted a more populous and a richer country making use of the experience of a smaller and poorer one, everything tended to be bigger and better.

Though the general direction was the same and the same groove was followed and deepened for the most part, there were significant deviations here and there from the latter-day authoritarian trail that Mussolini and his Fascists had blazed. Not to improve upon your original is almost as bad as having to be original yourself. Circumstances, to begin with, were very different. Germany had actually been defeated in war and not merely robbed of some of the spoils of victory; Germany had passed through a proletarian revolution and seen a soviet state temporarily established in one part of her territory — she had not simply stood in fear of such things; Germany had drained the cup of inflation to the dregs and not just gazed into its depths; Germany had been disarmed and felt herself helpless, while Italy had felt herself helpless without being disarmed; the National Socialist Party, while it did not secure a clear majority of the votes of the German

DIFFERENCES  
AND  
DEVIATIONS

people before Adolf Hitler became Chancellor, certainly had the support of more people than any other single party at that time, but Mussolini's Fascist party was not in that position in October 1922, and never did reach it until all other parties were forcibly suppressed.

Nobody can claim that Italy actually wanted an authoritarian *régime* at any time before October 1922, but it is at least open to argument that Germany had been ripe for such a *régime* for two or three years before January 1933. The writer lived almost continuously in Germany between the summer of 1926 and the summer of 1928 and during that period saw every evidence that an attempt was being made to honour and perpetuate the democratic institutions of the Weimar republic on the part of the bulk of the German people. In the *Reichstag* elections of May 1928 the National Socialist Party polled only eight hundred thousand votes throughout the *Reich*, and secured only twelve seats. It was one of the minor parties that one hardly noticed among the thirty-five that presented lists, and the actual party membership was, in that year, barely one hundred thousand. Spending the summer of 1930 in Germany after two years absence, the writer found himself in a different world. It was now difficult to find anyone who continued to believe in the Weimar republic in its existing form; the situation, one was told, was so bad that almost any alternative to the existing situation would be acceptable; the inflation period was too near for Germans to be able to face with anything but savage despair the gradual worsening of a fresh economic depression; the evacuation of the Rhineland was welcomed, but it had been withheld too long and came too late to lighten the general gloom or to dispel bitterness. The German people went to the polls in September 1930 in a mood of desperation and

GERMANY  
"AWAKENS"

the National Socialists who claimed that they could do so much (and wild as their

ideas seemed to many, to do anything was surely better

than to sit and do nothing), received nearly six and a half million votes and 107 seats in the *Reichstag*, though the party membership was still under four hundred thousand. Germany was at last awake, but not all the propaganda in the world, nor all the Niebelung gold of the Rhineland industrialists, could have secured those six million fresh votes if the coming of a new economic depression had not thrown Germany into a mood of black despair. When you feel sure that your bank is about to close its doors you do not hesitate about signing a blank cheque, whatever the state of your account. Adolf Hitler and his party had for years made no secret of the degree of obedience they would demand from the German people once they were placed in power, nor of their inflexible determination to carry out every item on their immutable programme, whatever the opposition or the obstacles. It was fair warning, and the six and a half million who voted for them in September 1930, and the thirteen and three-quarter million who supported them in July 1932, could therefore have had no illusions that they were continuing to support the principles of the Weimar constitution or the libertarian state. They had expressed a definite preference for an authoritarian régime. Six months later, despite the loss by the National Socialists of two million votes in the elections of November 1932, they had one . . . and it lived up to its professions.

On January 30, 1933, Adolf Hitler accepted from President von Hindenburg the office of Chancellor of the *Reich* at the head of a coalition ministry of the right, the National Socialists being the largest party in the new *Reichstag* (holding 196 or rather under one-third of the total seats) after Schleicher's attempt to govern without National Socialist support had failed. The opportune and symbolic *Reichstag* fire in February made it possible for the National Socialists to secure the holding of new elections on March 3 in circumstances of high political excitement most favourable to themselves, and



they returned with 288 seats and an increase of five and a half million votes (or three and a half million more than their previous record poll in July 1932). The support of the small German Nationalist group and the forcible exclusion of the Communist deputies from the *Reichstag* now gave the National Socialists a clear majority in that body, and made it possible for the government to secure the passing on March 24 (by a vote of 441 to 94) of an enabling act (*das Ermächtigungsgesetz*) "to combat the misery of people and *Reich*" which accorded it unlimited powers of legislation by decree, permitted it to set aside or amend any part of the constitution, and allowed it to conclude treaties as well as to make laws without consulting the legislature. Indeed, it is hardly correct to speak of the *Reichstag* as "the legislature" after its passing of this law, for all power was now concentrated in the hands of the government and any separation of powers or even of functions was abandoned. The authoritarian state was legally in existence.

The National Socialist repudiation of a parliamentary system of government, with the ministry responsible to the legislature, having been implemented, those parts of the Weimar constitution to which the party had specifically objected were immediately (March 28) declared null and void. These included articles 114-118, 123, 124 and 153, all part of the section on fundamental rights and duties of Germans, and their abrogation destroyed such elementary libertarian rights as the inviolability of the person and of the home, protection from punishment by *ex post facto* laws, the secrecy of the post, the right to the expression of opinion without censorship, the right of peaceable assembly, the right of association and the protection of property except against legal expropriation. This cleared the way for the piecemeal regimentation and "purification" of German life in all its activities that was

THE AUTHORITARIAN STATE  
IN BEING

PARLIAMENTARY  
GOVERNMENT  
REPUDIATED

to follow, in accordance with the avowed National Socialist *Weltanschauung*, elaborated from year to year at the Nürnberg party congresses.

After parliamentary government and fundamental rights had been dealt with, it was the turn of local autonomy. One of the most persistent reproaches levelled by the National Socialists at the Weimar constitution had been its failure to set up a completely unitary state, and the districts in which the party itself was organized had been created without any regard for feelings of particularism in the separate *Länder*. Adolf Hitler had stated in *Mein Kampf*, "We can have no separate states within the nation". Accordingly, on March 31, a law (*das Gleichschaltungsgesetz*) took away from the *Länder* their legislative powers under the federal constitution and suspended the functions of their separate elected assemblies (these assemblies were formally abolished a year later), and on April 7 another law (*das Staathaltergesetz*) placed regents nominated by and responsible to the *Reichskanzler* to watch over the administration of each of the *Länder*. The *Reichskanzler* himself became *Staathalter* for Prussia, and thus the "personal union" between Prussia and the *Reich* that had been a feature of the Hohenzollern-Bismarckian empire was reverted to, without Prussia regaining her dominating position in it. Subsequent legislation has completed the liquidation of the *Länder* as units in a federal system, and they have not even been permitted to remain as major administrative divisions, being in process of replacement by a departmentalization of the *Reich* into districts. The *Staathalter*, into whose hands every aspect of the administration and government of the former states were gradually drawn, acted as it were as official receivers on behalf of the *Reich* while the affairs of the *Länder* in liquidation were being wound up. Germany is now as unitary a state as France, and even more unitary than the United Kingdom of Great Britain

A UNITARY  
GERMANY  
CREATED

and Northern Ireland, for it does not appear that her new *Ostmark* will secure any of Ulster's special privileges.

The consummation of the marriage of party and state was secured by the suppression of all competing party organizations in the law of July 14, 1933, which declared "The National Socialist German Workers' Party is the only political party in Germany", and by the official merging of that party into the state in December. The abolition of the representative assemblies of the separate states on January 30, 1934, and of the second chamber (the *Reichsrat*) of the *Reich* itself on February 14, completed a year of constitutional revolution which (quite apart from parallel changes in so many other fields) left Germany breathless and completely transformed. The *régime* claimed to have set her on her feet and its critics declared that it had stood her upon her head, but nobody could assert that she remained unmoved. A further six months saw the crushing and liquidation of a dissident National Socialist faction (believed to possess, among other things, more radical economic ideas than were healthy for a party that was to be Europe's bulwark against Bolshevism) in the "purge" of June 28, and the merging of the functions of *Reichspräsident* and *Reichskanzler* on August 2, 1934, after the death of President von Hindenburg, to

PARTY AND  
STATE PURGED  
AND MERGED

make Adolf Hitler head of the German state *de jure* as well as *de facto*, an exalted station that has in Italy remained beyond the reach of Benito Mussolini.

On July 14, 1934 (the hundred and forty-fifth anniversary of the storming of the Bastille) Adolf Hitler declared that the National Socialist revolution was over, and though much elaboration of his new structure has since followed, its essential features (to be crowned a few days later by his assumption of the headship of the state to complete the trinity of President, Premier and Party Leader in his one person) were all present by that date.

TRINITY OF  
PRESIDENT,  
PREMIER AND  
PARTY LEADER

What he has done since presupposed the existence of a Germany possessing such features—a completely unitary, entirely concentrated, thoroughly authoritarian form of government, with one party of the *élite* of the race, identified with an omniscient state in which the word of the *Führer* is the law. It is true that, for all her economic planning, Germany has not become a corporative state to the extent of introducing functional representation, but then the Third *Reich* has little faith in representation as a principle of government. The leader principle makes it redundant.

The permeation of every human activity and of every institution in Germany of the Third *Reich* by this *Führer-princip* is undoubtedly the most characteristic line of development of the *régime*. Adolf Hitler's leadership of the party was established as part of its creed before it came into power, but his assumption of the office of *Reichskanzler* and absorption of that of *Reichspräsident* (the latter name, an innovation of the hated Weimar constitution, and denoting an office for which Hitler had once been an unsuccessful candidate, was suppressed) made that leadership immeasurably more real and extended it over the whole German people. So long as the principle of "all authority from above — all responsibility from below" was accepted, Germany could bristle with leaders, great and petty (though the sacred word *Führer* came to be reserved for Hitler alone and all minor leaders had to be called *Leiter*). The National Chamber of Culture, the Hitler Youth Organization, the Labour Front, the National Food Estate, the transformed National Economic Council, all these and many other organs of the Third *Reich* were made to operate from top to bottom through the leader principle. Leaders, responsible only to Hitler, who rapidly became national figures (one or two, like Hermann Goering, were, of course, already such before January 1933) stood at the top of each hierarchy, and under them

THE LEADER  
PRINCIPLE

were tiers of sub-leaders of various grades. That Zeno-  
cracy which has made Italy proclaim from her cam-  
paniles "There is but one leader, and his name is Benito  
Mussolini" has not become such a feature of German  
fascism, where leadership is everywhere, though its  
quintessence lies only in the *Führer* himself. Italy's  
general post of high officials has not been the rule in the  
Third *Reich*, though the blood-letting party purge of 1934  
and the bloodless army purge of 1938 are exceptions.  
Nevertheless, the leader-principle has proved fatal to  
cabinet government in any form, and the nominally  
absolute constitutional powers of the cabinet (given to  
it for four years in 1933, and for four more years in 1937)  
are in practice wielded only by the *Führer* himself and a  
handful or inner cabinet of very highly trusted party  
comrades. The cabinet as a whole advises but it does  
not decide, and the title of "minister without portfolio"  
has recently tended to designate "minister who is no  
longer consulted" (Dr. Schacht and Baron von Neurath  
entered that category at the beginning of 1938, though  
the secret foreign affairs committee of the  
cabinet, created in February 1938, is pre-  
sided over by the latter. The place in  
government and in the determination of  
policy of this institution is not yet clear, though it appears,  
from the careful picking of its personnel, that it will be  
no more likely to disagree with the personal views of the  
*Führer* than does the Fascist Grand Council with those  
of the *Duce*, and it has the advantage over the Grand  
Council of being able, with the assistance of *Mein Kampf*,  
to be able to surmise in advance with some confidence  
what those views are likely to be.)

All the main features of the universal franchise laws  
of the Weimar republic were retained. No occupational  
representation was introduced and no declarations were  
made to the effect that the direct universal franchise was  
a lie. But it was already a sleeping dog, for elections

CABINET AND  
FOREIGN  
AFFAIRS  
COMMITTEE

actually resolved themselves into plebiscites in which the people of Germany voted either for or against a list of candidates of the National Socialist Party presented to it (names were not given) by the *Führer*, but were not permitted even in theory to put forward any other candidates or competing lists. In March 1938 the *Reichstag* was again dissolved, and the new election was combined with a referendum on the absorption of Austria as part of the German *Reich*. The people of Germany and Austria (all men and women over twenty years of age who were of "German" race, whereas the proposed plebiscite of the Austrian Schuschnigg government had, in accordance with the Austrian constitution of 1934, made the age twenty-four) were asked "Do you approve of the reunification of Austria with Germany as accomplished on March 13, and do you vote for the list of our *Führer* Adolf Hitler?" As this list (again the individual names were not published) contained representatives of Austria, in proportion to her population, the first question may be said to have been begged in advance. With the publication of the result of this plebiscite, the greater Third *Reich* came officially into being. It had already existed *de facto* for nearly a month. The Weimar republic had been a lesser Germany, and not only in territorial extent, in National Socialist eyes. "Die Republik als Sklavenkolonie des Auslandes hat keine Bürger, sondern bestenfalls Untertanen", wrote Adolf Hitler in *Mein Kampf*. Was this Greater Germany of 1938 to become a new Valhalla on a new earth, or merely an *Ersatz-Deutschland*, perpetually tightening her belt in order to be able to extend her frontiers? A further extension of frontiers was to follow within six months, but "Germany has no further territorial ambitions in Europe", declared Adolf Hitler on September 26, 1938, so it must be left for time to draw up (and fill in) the final plebiscite.

UNIVERSAL  
FRANCHISE  
AND  
PLEBISCITE

A GREATER  
GERMANY ?

## CHAPTER XXVIII

### THE AMERICAN WAY—STATE-PLANNING *AD HOC*

"FOURTEEN nations, with 240,000,000 people, have adopted notions of fascism. And fascism has demonstrated a way to fool all the people all the time — by the suppression of all criticism and free expression. Intellectual sterility and deadened initiative and individuality are its inevitable results. It is becoming a gigantic spartanism", said Herbert Hoover in April 1938, returning to the United States after a European tour. Six months earlier, his successor as President of the United States had said, "We do not deny that the methods of the challengers, whether they be called communistic, dictatorial or military, have obtained for many who live under them material things they could not have obtained under democracies which they had failed to make function. Unemployment has been lessened — even though the cause is the mad manufacturing of armaments. Order prevails — even though it is maintained by fear at the expense of liberty and individual rights. So their leaders laugh at all constitutions, predict the copying of their own methods, and prophesy an early end of democracy throughout the world. Both that attitude and that prediction are denied by those of us who still believe in democracy." Such utterances, such a belief in democracy, such a repudiation of authoritarian methods, could undoubtedly have found endorsement from end to end of the United States of America in the years 1937 and 1938 . . . from the National Union of Manufacturers and from the Communist Party of America, from the editors of the *Saturday Evening Post* and from those of

"IT CAN'T  
HAPPEN  
HERE"

the *New Republic*, from the National Federation of Labor and from the Committee for Industrial Organization, from Mr. Justice McReynolds and from Mr. Justice Brandeis, from the Daughters of the American Revolution and from the Forgotten Man. Despite Mr. Sinclair Lewis's alarming fantasy, quite ninety-nine and several tenths per cent of the American people appeared to remain convinced that "It Can't Happen Here".

Yet those conditions which had preceded the setting up of authoritarian *régimes* in other countries were many of them in existence in the United States of America by the beginning of the nineteen thirties — a restriction of markets, widespread unemployment, industrial unrest, agrarian despair, capitalist panic, and a profound disillusionment concerning the ability of existing governmental machinery and political institutions to deal with the new politico-economic problems that had arisen since these were fashioned. To this was added a certain impatience with these same political institutions regarding the way in which they were fulfilling their original and limited function of maintaining and preserving libertarian realities and public order in a fully expressionist community. If they neither solved new problems in government and in social organization, nor continued to give satisfaction in dealing with old ones, why should they continue to be regarded as sacred? Congress and, even more so, the state legislatures were accused of being acutely susceptible to the persuasions of lobbyists, the President and state executives were at times thought to broach the pork barrel for their friends and supporters rather too often, and the judiciary from the Supreme Court downwards came to be regarded as the watchdog of anti-social privilege, of entrenched and corporate wealth. The class of politician which it delighted the people to honour and to maintain in office was regarded by many thinking Americans as ranking low in public

AMERICAN  
POLITICAL  
INSTITUTIONS  
UNDER FIRE



morality and private integrity. In particular, the administration of, and the public and official reactions to the eighteenth amendment to the constitution during the years of its legal validity (1920-33), gave support from many directions for a re-examination of the foundations of a system of government that (said the supporters of the amendment) could so signally fail to enforce the fundamental law of the land, and (said its opponents) that could permit a determined minority to secure popular sanction for the imposition of a completely non-libertarian social code upon a civilized and professedly democratic people. Even before the onset of the great depression of the early thirties created an atmosphere of urgency, American political institutions were under fire from many angles. When George Bernard Shaw told a packed audience in the Metropolitan Opera House in New York City, on April 11, 1933, "The American constitution is . . . not really a constitution but a charter of anarchism. . . . The ordinary man is . . . an anarchist. . . . This anarchism has been at work in the world since the beginning of civilization, and its supreme achievement up to date is the American constitution", nobody took "the celebrated buffoon" literally, but those of his hearers whose thoughts strayed from his words to the Ohio Gang and Teapot Dome, to the salubrious suburb of Cicero, or to the bad odours which had ascended from the New York sewer contracts (not to go back further than one decade), may have gone home disquieted rather than amused. May not the story (even if apocryphal) of that newly elected Senator, who, when participating in his first roll-call at Washington, is reputed to have answered "Not Guilty", typify something more than a certain brand of native humour?

By the beginning of the nineteen thirties, then, the governmental machine of the United States, which had been running for nearly a century and a half with but minor replacements and additions, apart from the one

major overhaul of Reconstruction, was showing unmistakable signs of needing a reconditioned power unit. But these easily perceivable signs were only the symptoms of fundamental maladjustments. The machine remained geared to the less exacting needs of another age. It was now required to go faster, carry a heavier load and surmount steeper gradients than its framers or even its reconstructors had ever imagined. There was now no longer that margin of power and safety that allowed it to meet unexpected demands and stresses without causing anxiety.

SYMPTOMS OF  
FUNDAMENTAL  
MAL-  
ADJUSTMENTS

The fundamental maladjustments were deep-seated and not easily accessible. Some forty years earlier the historian F. J. Turner, in his essay on *The Significance of the Frontier in American History*, had first made clear the full importance of the existence and withdrawal of frontier conditions in the development of the United States. "What the Mediterranean Sea was to the Greeks", he had said, "breaking the bond of custom, offering new experiences, calling out new institutions and activities, that, and even more . . . the ever retreating frontier has been to the United States directly and to the nations of Europe more remotely. . . . And now, four centuries from the discovery of America, at the end of a hundred years of life under the constitution, the frontier has gone, and with its going has closed the first period of American history." He was referring to the fact that the census of 1890 had revealed that, at last, a continuous belt of unsettled land stretching from the southern to the northern border no longer existed in the United States, and that the hitherto unbroken line of the frontier was now torn into isolated and insignificant fragments, soon to disappear one by one. As a phenomenon the frontier stage in American history was over. Since Turner wrote, many investigators have followed him in his exploration of the significance of the frontier,

END OF THE  
FRONTIER  
STAGE IN  
AMERICAN  
HISTORY

but the United States as a nation is only now beginning to realize that it remained right up to the end of the nineteen twenties organized both economically and politically as a land still possessing the stimulus and the safety valve of an unbroken frontier. Recent feverish efforts at reorganization on a gigantic scale are, from some aspects, simply an attempt to readjust political institutions and political economy to meet the needs of a post-frontier phase, the existence of which had caught the country unaware and unprepared when it passed out of the smoke screen of boom conditions. The force of the great depression of the thirties was itself undoubtedly due in part to the failure to realize that the frontier was gone (and had been for decades) and that adjustment had to be made, to fit American institutions and ideas to the needs of a society that had lost its once characteristic fluidity. This loss of fluidity was, by the beginning of the nineteen thirties, of a twofold nature. Territorially the frontier had gone and therefore geographical displacement of the population of different parts of the United States was reduced from great streams to isolated

IMMIGRATION  
CEASES AS A  
MAJOR  
PHENOMENON

trickles. Immigration also (automatically checked by the war of 1914-18 and legally restricted to a drastic extent during the next decade) had now ceased to be a factor that counted, and therefore the composition of the population of different parts of the United States was tending to lose its kaleidoscopic and unstable qualities and to remain set in definite ethnographical patterns. Some investigators have even foretold, as a result of the joint impact of the disappearance of the frontier and the cessation of large-scale immigration, the appearance of a new sectionalism in American life, with a dominant immigrant nationality or group of kindred nationalities crystallized in each section; others expect, rather, that the melting-pot which has so patently refused to distil a common denominator American from its varied human

ingredients up to the present, will at last settle down to throw off its scum and produce the wished-for uniform brew of hundred-per-cent Americans, now that it is receiving no appreciable additions to its contents. Which ever turns out to be true, the problem of governing the United States is going to be very different as a result of such changes in the people by whose consent she is declared to be governed. Her *Wanderjahre* are finished, her *Völkerwanderung* is over and she must be prepared to enter a more sedate middle age. Following this realization, she has become receptive to the idea of buying some more life insurance, in the shape of elaborate government agencies and comprehensive social legislation such as she would have, and indeed had again and again spurned in the first vigour of her wild-running youth.

Though a strong collectivist trend had been evident in government policy and in legislation in many other parts of the world since the eighteen seventies, the political system of the United States remained committed until 1929 to *laissez faire*. This remained particularly true in

PERSISTENCE  
OF "LAISSEZ  
FAIRE" IN THE  
U.S.A.

domestic relations. The United States as a whole had no unemployment insurance, no national sickness insurance and no old-age pensions. Only those, or the dependants of those who managed to get killed, maimed or at least drafted in one of the United States' infrequent wars, could expect recognition of their claims to relief from national funds. There was no national regulation of the hours or conditions of labour of man, woman or child, and the states varied widely in their degree of social consciousness on these matters. A person was as free to work, or to work others, as hard as he liked. "Go West, Young Man!" was a perpetual injunction applicable to the discontented, the failures and the misfits of every community, and the rolling stones rolled until they at last settled down somewhere in literal or in colloquial obedience to this injunction. Every immigrant carried

a millionaire's toothpick in his bundle, and the White House stood within full view of every cradle in the United States. In relation to things outside or coming from outside the United States, *laissez faire* did not, however, remain unimpaired so long. The Monroe Doctrine itself was only one-way *laissez faire*; the protective tariff was not even that. Indeed the tariff left the United States the land of opportunity — for everything but foreign goods. Apart from the operation of the tariff, the vast natural wealth of the United States made autarchy, or a policy of self-sufficiency, virtually automatic during the nineteenth century and well into the twentieth. The tariff was amended from time to time in response to changing conditions and to the varying influence of different pressure groups, but the passing of a new tariff act tended to be a free-for-all tussle, with no holds barred, rather than a piece of state-planning. The

THE TARIFF  
AND THE  
IMMIGRATION  
QUOTAS

restriction of immigration from 1917 onward (its regulation between 1882 and 1916 can hardly be called restrictive, and the largest annual figures were attained in the early years of the twentieth century) is really the United States' first piece of wholehearted federal planning, and the quotas of 1921, 1924 and 1929 are among the most elaborate pieces of deliberate interference by governmental agencies with the natural interplay of human relations known to history up to their time.

It may be that the quota acts broke the ice for the transfer to the domestic sphere of such comprehensive federal regulation, which had hitherto been confined to the somewhat amorphous sphere of inter-state commerce, so that the railroad industry was carefully regulated, as were large-scale communications generally, whether by land, by water or by air, but other industries, and above all the sprawling field of agriculture, were but slightly touched. The disappearance of the unbroken frontier, the end of bonanza agri-

BREAKING  
THE ICE OF  
COLLECTIVISM

cultural prosperity, the contraction of foreign markets, the restriction of immigration, and finally the stock market crash and the great depression, all added up to a pressing demand for the final abandonment of *laissez faire* and for the initiation of a collectivist policy in government. The situation was not so chaotic as to create any widespread demand for the overthrow of existing institutions. The new collectivism was initiated within the familiar constitutional framework that had stood for nearly a century and a half, but it was something that the framers of the constitution had never envisaged. Could the constitution take it ?

The American people were to be given a "New Deal", but, it was vehemently protested, the old constitution would serve. "What we have done is to rediscover the constitution, to revitalize the powers it was intended to create. . . . We are turning our back on the policeman doctrine of government and recapturing the vision of a government equipped to fight and overcome the forces of economic disintegration. . . . A strong government with an executive amply empowered by legislative delegation is the one way out of our dilemma, and on to the realization of our vast social and economic possibilities," declared a leading member of that "brain trust" (as its enemies called it to bring it into public disfavour) that was reputed to be planning this New Deal. Of what did this New Deal consist, and what government agencies were used or adapted to bring its plans into operation ? How did these differ from the somewhat fumbling approach to the solution of great social and economic problems made by the other old-established libertarian states ? Did they contain any elements of the corporative experiments of Italy or the thorough-going reorganization of society from top to bottom of Russia ? How much was indigenous and how much derivative ? Did it all add up to a new approach that might provide fresh hope to an entangled world, or

INTERPRETA-  
TIONS OF THE  
NEW DEAL

was it just a piece of local and highly impermanent patching? Was it really a battle of democracy, or was it a species of regimentation so ominous that alert citizens ought to league together to preserve their traditional liberty against it?

One of the most acute analyses of this revised conception of the sphere of government activity in the United States has referred to it as "The Permanent New Deal", as irreversible as it was inevitable. He sees the acceptance toward the end of 1929 of the view that "government must henceforth be responsible for the maintenance of the standard of life of the people" in addition to undertaking defence against external aggression

"MAINTEN-  
ANCE OF THE  
STANDARD OF  
LIFE"

and ensuring domestic peace, as the first step from which the whole New Deal activity has logically developed. The federal government undertook to make the whole economic order operate prosperously and abandoned the policy of *laissez faire* with regard to the business cycle. The result was the acceptance by the government of the duty of regulating the purchasing power of money, of providing financial aid in the forms of loans and credits to private enterprise struggling in the depths of business depression, to enable it to keep alive, and to expand government enterprises to offset the effects of the contraction of private enterprise. To fulfil these duties came the creation of the Reconstruction Finance Corporation (R.F.C.), the Federal Emergency Administration of Public Works (P.W.A.) and a whole mass of related and subordinate agencies to implement and administer the loans and credits forthcoming from the one and the grants made

"PUMP-  
PRIMING"

by the other. The policy of "pump-priming", initiated in a comparatively modest and mundane way by the Hoover administration, and since then carried to astronomical lengths by the two Roosevelt administrations, represented a departure from accepted standards of public

finance in the United States to which there had been no parallel since Alexander Hamilton had to sell to his embarrassed colleagues and an incredulous public the idea that a properly funded public debt could answer all the purposes of money and a number of others as well. The system has been referred to as "the new super-government of the U.S., which would so astonish (and presumably displease) Mr. Calvin Coolidge". It may be hazarded that it would also astonish (and presumably displease) Washington, Jefferson, Jackson, Lincoln, Cleveland, Theodore Roosevelt and Wilson. It certainly astonished and displeased many men of all parties who were more in a position to be consulted, including Alfred E. Smith, Andrew Mellon and Henry Ford, and in its later stages it also succeeded in incurring the displeasure of Walter Lippmann, but as the last of these has himself pointed out, we are in the presence of a change due to fundamental historical forces rather than one due to party or human inclinations when men who think differently behave alike, and both Herbert Hoover and *Franklin Roosevelt accepted unquestioningly a wide new function for the federal government, unparalleled in the history of the United States, and far transcending in scope and significance the taking over by the federal government of the protection of the constitutional rights of the individual citizen in the eighteen sixties. Then an existing function was transferred from the states to the union, but now a new one was lifted out of limbo. Few of the separate states had hitherto considered it either their right or their duty to maintain the economic standard of life of their citizens, and fewer still had done anything about it, beyond the most tentative experiments.*

But to concede that a function of government is to maintain the standard of life of the citizen is not to admit that the political checks and balances of a middle-aged democracy should be changed for the adolescent and arbitrary planning of his activities from the cradle



to the grave, for his own good if even against his will, such as was the new authoritarian way. The American way, since revolution was eschewed and no regular amendment of the constitution could be expected to pass earlier than the next depression but one, was to see by experiment and trial and error just how much collectivism could, if it survived hostile public opinion, get through the meshes of a constitution whose pattern was wholly individualistic. Even a determined executive and a willing legislature could not be sure of getting collectivist legislation past those watchdogs of the constitution, the federal courts, when it should come to be questioned (as it undoubtedly would be) in cases brought before them. Though it was the function of the courts simply to interpret the constitution, that was a very great power, for it gave them the last word concerning the validity of any challenged piece of legislation. "The constitution", declared Chief Justice Hughes, "is what the judges say it is", and critics of the courts have claimed that "the legal mind of the United States is still predominantly wedded, in the age of the positive state, to the ideals of a *laissez faire* society incompatible with its adequate functioning." They assert that from the second half of the nineteenth century onward, American jurists have gone further than merely interpreting the constitution, and have "adopted the idea of a supreme law superior to the constitution itself" as a barrier to the people's will, as, for instance, in stretching the fourteenth amendment to protect commercial corporations as "persons" against legislation seeking to regulate them, and thus allowing these corporations to erect on the territory of the United States "Industrial Empires" virtually invulnerable to federal or state attempts to reduce their privileges and curb their anti-social tendencies. To some people the American Union appeared to have become a state of corporations

THE AUTHORITARIAN OR THE AMERICAN WAY ?

THE COURTS AS GUARDIANS OF THE CONSTITUTION

long before that other rival in democracy, the corporative state, was born or thought of in Europe.

The courts had a perfectly logical reply to their critics in reaffirming that they could only interpret the constitution as it was, and according to their lights, rather than as it might be or in accordance with the current view of a transient majority of the people's representatives, and that if the constitution were amended they would loyally enforce the amendment even against their own previous judgements. While the old *laissez faire* view of government prevailed there tended to be a general coincidence between the views of the national legislature and the national courts on what was and was not permitted by the constitution (though this did not extend to the cruder purviews of some of the state courts and legislatures) and the right of the courts to declare an act of Congress void was acted upon only twice before the Civil War (in the case of *Marbury v. Madison* and in Taney's judgment on the Missouri Compromise). Mr. Justice Holmes even placed on record the view that it would not be very terrible if the courts were to lose the power to declare acts of Congress void, provided that they retained such power with

THE POWER  
TO DECLARE  
ACTS OF  
CONGRESS  
VOID

regard to state legislation. But when the United States became predominantly a great industrial society and the safety valves of her earlier days were one by one clamped down, this coincidence no longer held good. The clashes over anti-trust and corporation-baiting legislation found the lawyers and the politicians already at variance, but these skirmishes were as nothing beside the deadlock which developed into a war of attrition over certain features of the New Deal legislation of the middle nineteen thirties. Each side protested the loftiness of its motives and the inevitability of its course, the President and Congress regarding their measures for preserving the economic affairs of the country from chaos as the best protection for democracy and the constitution, and the

courts resolutely refusing to place upon the constitution interpretations that would, in their opinion, undermine the form of government that the people of the United States had given to themselves and bidden the courts maintain for them against all comers.

Thus, though the social and economic policy of the New Deal was broader in concept and more comprehensively planned than were similar experiments in other countries, it was restricted in its enactment by the need to avoid getting outside the framework of the constitution, and in its execution by the possibility of nullification at the hands of the courts. How much projected New Deal legislation was destroyed in disgust by its progenitors before it had seen the light of publicity because the courts would never stomach it, just

STATE-PLAN-  
NING IN A  
STRAIT-JACKET

as affrighted animals devour their young if external danger appears to threaten them, may never be known ; but how much actual

legislation, passed by substantial majorities in Congress and approved by the President, has been laid low by the courts, is abundantly clear. While the National Labor Relations Act, the Social Security Act and such bodies as the Tennessee Valley Authority, passed through the courts unscathed, other measures such as the processing taxes of the Agricultural Adjustments Administration (A.A.A.) and the whole of the National Recovery Act (N.R.A.), together with less comprehensive legislation like the Guffey Coal Act, were eventually invalidated. Both the N.R.A. ("a great collectivist measure which

FATE OF  
N.R.A. AND  
A.A.A.

envisaged the organization of American industry under a system of codes closely regulating production, prices and labor con-

ditions") and the first A.A.A. ("to agriculture what N.R.A. was to industry" and involving elaborate schemes for checking over-production) had been for some time in operation before the decision of the Supreme Court of the United States brought the activities of the former to

a full stop and forced the latter to find a new and cramping alibi in "soil conservation", and the resentment and disorganization caused among both administrators and beneficiaries of these two grand-scale pieces of collectivism, helped to bring to a head the agitation for a reform of the courts, and particularly of the Supreme Court of the United States, which caused the triangular struggle of executive, legislature and judiciary during the first half of 1937 over President Roosevelt's "Court Plan". Congress could only be persuaded by the executive to pass a mild law providing for the voluntary retirement on pension of federal judges, instead of compulsory retirement and an immediate increase in the number of judges (the alleged "packing" proposal) to facilitate the handling of accumulated cases, as the President had advocated. The incumbent judges had, throughout the controversy, protested vigorously that the more radical of the President's proposals were unnecessary. It is very significant that the idea of seeking to alter the constitutional position of the federal courts by process of amendment (constitutional amendment was not needed merely to alter their size and the conditions for the retirement of judges) was never seriously proceeded with, even by the most vehement critics of recent decisions of the courts. "The vital need is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it", said President Roosevelt in his message to Congress at the beginning of 1937. "Rightly considered", he thought, "it could be used as an instrument of progress and not as a device for the prevention of action."

ATTEMPTS TO  
REFORM THE  
FEDERAL  
COURTS

The constitution thus remains sacrosanct, and no word is raised against it even by those who find the greatest difficulty in running the government of the United States within its framework in the way they consider it needs to be run. The constitution of the United States of

America still stands solid in a changing world. If it failed completely to digest the New Deal, then so much the worse for the New Deal. State planning by five- or four-year stages, rigidly laid down in advance and tenaciously adhered to, such as the U.S.S.R. and the Third German

THE  
CONSTITUTION  
REMAINS  
SACROSANCT

*Reich* have attempted, is not possible under "a government of reflection and choice" such as the United States of America accepted in 1789 and had not, for all its admitted imperfections, rejected a century and a half later. The limitations of the American constitution, as interpreted today, prescribe that great collectivist experiments should be carried through by *ad hoc* methods that may hit or miss, may be abandoned, reversed or revised at any time, and may not always be the methods that

PURPOSEFUL-  
NESS RETURNS  
TO  
GOVERNMENT

systematic state-planning would have produced. But at least they are methods with a broad purpose behind them for the social and economic welfare of the citizen such as was once thought incompatible with libertarian institutions. "The association between liberty and the absence of purpose in government was merely a temporary coincidence due to the fact that in the nineteenth century the English-speaking peoples had an open frontier in America and a head start in the export of manufactures from England." That purposefulness by which American political institutions were first created, needed to be recaptured if they were to continue both to promote the general welfare and to secure the blessings of liberty. It is still possible, in contemplating the United States of America, to believe that governments are instituted among men to secure life, liberty and the pursuit of happiness, but also to remember "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it".

These are words that the world at large should also not permit itself to forget.

# BIBLIOGRAPHIES



## BIBLIOGRAPHY

THIS is intended as a students' and not as a specialists' bibliography. Many of the works mentioned themselves contain useful bibliographical sections or copious footnote references, and wherever this material is specially valuable, attention will be drawn to it. No attempt is here made to duplicate such information. The *General Bibliography* confines itself to collections of the texts of constitutions and to standard and general commentaries. Texts of constitutions not available in the general collections or available only in collections confined to those of one country, together with additional texts to which it is wished to draw attention for special reasons, will be referred to in the appropriate *Chapter Bibliographies*.

To avoid the unnecessary repetition of full titles each work mentioned in this bibliography is given a reference number. If the full title has already been given, only a short title or the author's name, followed in each case by the reference number within parentheses, will be found.

A comprehensive critical bibliography or even a list of all the printed material on the subject of Modern Constitutions since 1787 does not exist, but an admirably executed and planned torso of such a work will be found in

1. HILL, H. B., *The Constitutions of Continental Europe, 1789-1813* (*Journal of Modern History*, March 1936, Vol. VIII, No. 1, pp. 82-94). The numerous special bibliographies and footnote references to be found scattered through the volumes of
2. DARESTE, F. R. and P., *Les Constitutions Modernes. Europe—Afrique — Asie — Océanie — Amérique, Traductions accompagnées de Notices Historiques et de Notes Explicatives* (Quatrième édition entièrement refondue par J. DELPECH et J. LAFERRIÈRE, 6 vols., Paris, 1928-34), are most valuable, though the lists are given without critical commentary. The bibliographical material is not confined only to works dealing with the texts printed in this collection, but covers constitutional history as well. Numerous select bibliographies, dealing in a more compact way with contemporary or recent governmental forms, will be found in the articles on constitutional subjects in the
3. *Encyclopaedia of the Social Sciences* (ed. SELIGMAN, E. A. and JOHNSON, A., New York, 1931-35. Reissue 1935), especially



the article on "Government" (Vol. VII, pp. 100-106), which has separate bibliographies for History and Theory, General Studies and Compilations, the U.S.A., Great Britain, British Dominions, British Commonwealth of Nations, France, Belgium, Italy, Switzerland, the Netherlands, Germany, Scandinavia, Russia, the Baltic, the Succession and the Balkan states, Latin America, Spain, Portugal, Japan and China. A specialized bibliography which, within its field, is more complete and up-to-date than either DARESTE (2) or the *Encyclopaedia of the Social Sciences* (3) appears at the end of

4. KANTOROWICZ, H., *Dictatorship: A Sociological Study* (Cambridge, England, 1935: reprinted from *Politica*, Vol. I, No. 4, August 1935). This "Bibliography of Dictatorship" (compiled by ELKIN, A.) is restricted to what are therein defined as post-war dictatorships, and has separate sections on General Works, Biographies, Periodicals, Yearbooks, Germany, Italy, the Soviet Union, Austria, Hungary, Poland, Portugal, Spain, Turkey, Yugoslavia and Baltic States. It is thus more comprehensive than its title might indicate.

# GENERAL BIBLIOGRAPHY

## I. COLLECTIONS OF CONSTITUTIONAL TEXTS

The first really satisfactory and representative collection of modern constitutional texts was that of

5. PÖLTZ, K. H. L., *Die europäischen Verfassungen seit dem Jahre 1789 bis auf die neueste Zeit* (First edn., 3 vols., Leipzig, 1817-1820. Second edn., 3 vols., Leipzig, 1832-33. Supplementary 4th vol., ed. BILAU, F., Leipzig, 1847). The second edition entirely supersedes the first (which had been published anonymously). Vol. I is confined to Germany; Vol. II deals with France, the Netherlands, Belgium, Spain, Portugal, the Italian states and the Ionian Islands; Vol. III with Poland, Cracow, Galicia, Sweden, Norway, Switzerland and Greece; Vol. IV covers miscellaneous constitutional changes between 1833 and 1847. All the texts are given in German and the translations are reasonably reliable, as are the introductory and explanatory statements. An extremely useful chronological list of the two hundred and fifty documents contained in the first three volumes is given at the end of Vol. III. Many of these are separate laws, edicts and drafts, but about a hundred are texts of constitutions proper, and practically every constitution promulgated on the continent of Europe between 1770 and 1833 is included. Most of the texts are complete, but a few (such as that of the elusive Sicilian constitution of 1812) are paraphrased. The supplementary fourth volume is equally painstaking. A separate volume was announced to cover American constitutions since 1787, but it never appeared. Pöltz cannot be too highly praised for having produced such a work at such a time, and it is still of great value. In its day its influence, particularly in Germany, rivalled that of Rotteck's and Welcker's constitutional commentaries in *das Staatslexikon* (1834-49). Not until the Dareste family appeared upon the scene was anything more monumental produced. Pöltz is, unfortunately, not commonly found in libraries, but a useful alternative is
6. ALTMANN, W., *Ausgewählte Urkunden zur ausserdeutschen Verfassungsgeschichte seit 1776* (Berlin, 1897: revised edn., 2 vols., 1913) containing German texts, without commentaries, of the Virginia Bill of Rights and the Pennsylvania

constitution of 1776, the Articles of Confederation, the Massachusetts constitution of 1780 and the United States constitution, the principal French constitutional texts between 1791 and 1875, the Spanish constitution of 1812, the Belgian of 1831, the Swiss of 1874 and (in the original Italian) the Piedmontese *Statuto* of 1848. The same scholar has also covered German constitutions in

7. ALTMANN, W., *Ausgewählte Urkunden zur deutschen Verfassungsgeschichte seit 1806* (2 vols., Berlin, 1898). The first volume covers the period 1806 to 1866 (the constitution of the Confederation of the Rhine being given in its French text) and the second from 1867 to 1898. Prussia is reserved for a separate collection :
8. ALTMANN, W., *Ausgewählte Urkunden zur Brandenburgisch-Preussischen Verfassungsgeschichte* (2 vols., Berlin, 1897), the first volume going up to 1806 and the second covering from 1807 to 1891. A second edition (Berlin, 1914-15) was to be in three volumes, but only the two first (before 1806, and 1806 to 1849) were published. Altmann's scholarship is always impeccable and his texts thoroughly reliable.

The leading collection of constitutional texts in French is that of DARESTE (2) and four editions of this have been published since it first appeared in 1883. Unlike Pölitz and Altmann, Dareste includes only constitutions actually in force at the time of going to press. The four editions therefore give the texts of virtually all constitutions in force in the years 1883, 1891, 1913 and 1928 respectively, together with copious notes, historical introductions, commentaries and bibliographies. The fourth edition, in six volumes, appeared gradually (Vol. I, "Europe — Albania to Greece", in 1928; Vol. II, "Europe — Hungary to Yugoslavia", in 1929; Vol. III, "Europe — Supplement and Appendix", covering recent changes, and including index to the three volumes, in 1931; Vol. IV, "Latin America", in 1932; Vol. V, "British Empires, Africa, Asia and Mandatory Territories", in 1933; Vol. VI, "United States of America and States of the Union", in 1934). Dareste is pre-eminent among collections of constitutional texts in any language, but another useful collection in French is

9. MIRKINE-GUETZÉVITCH, B., *Les constitutions de l'Europe nouvelle* (Paris, 1928. Second edn., 1930). A long and useful *essai synthétique* precedes the collection of texts but they are not given separate explanatory notices. Italian decrees of constitutional importance issued since 1922 and Hungarian constitutional laws since 1920 are included.

10. MIRKINE-GUETZÉVITCH, B., *Les constitutions des nations Américaines* (Paris, 1932), is a complementary volume containing texts in French of all the constitutions of the sovereign states of North and South America in force at the end of 1931. Canada is included, but not Newfoundland.

The first general collection of constitutional texts in English that may be said to have permanent value was that of

11. DODD, W. F., *Modern Constitutions. A Collection of the Fundamental Laws of Twenty-two of the Most Important Countries of the World, with Historical and Bibliographical Notes* (2 vols., Chicago and London, 1909). The countries selected are the Argentine, Australia, Austria, Hungary, Austria-Hungary, Belgium, Brazil, Canada, Chile, Denmark, France, Germany (Vol. I), Italy, Japan, Mexico, Netherlands, Norway, Portugal, Russia, Spain, Sweden, Switzerland and the United States of America (Vol. II). Only constitutions actually current in 1908 are included, and all amendments up to that year are incorporated. Dodd's texts, and brief but valuable notes, have formed the basis of many subsequent collections. One of these adds to a selection of these texts a number of others as they were at a date crucial alike in modern history and in the history of Modern Constitutions, and
12. WRIGHT, W. F., *The Constitutions of the States at War, 1914-1918* (Washington, U.S. Government Printing Office, 1919), thus has special significance as being the last of what may be called the antediluvian collections. A flood of new constitutions, appearing in and after 1918, was followed by a flood of fresh collections of texts done into English. Three of the most useful of these, each compiled on a rather different basis from either of the others, were
13. MCBAIN, H. L., and ROGERS, L., *The New Constitutions of Europe* (New York, 1922), comprising those of Germany, Prussia, Austria, Czechoslovakia, Yugoslavia, the R.S.F.S.R., Poland, Danzig, Esthonia and Finland, together with summaries of those of Bavaria, Württemberg and Baden. The Belgian constitution of 1931, the French fundamental laws of the Third Republic and the Italian *Statuto* of 1848 (all as amended up to 1921), together with the French electoral law of 1919 and the Italian Law of Guarantees of 1871, are given in an appendix, as is also the Bryce Report of the British Second Chamber Conference of 1918. A 164-page Introduction and useful historical notes add considerably to the value of this collection.
14. *Select Constitutions of the World* (prepared for Presentation to Dail Eireann by order of the Irish Provisional Government,

1922. Dublin, 1922), containing texts in English, with introductory commentaries, of nineteen constitutions current in 1922, of which those of the Irish Free State, Mexico (1917), Denmark (1915) and the Union of South Africa are to be found neither in Dodd nor in McBain and Rogers, and

15. GRAHAM, M. W., *New Governments of Central Europe* (New York, 1926) and *New Governments of Eastern Europe* (New York, 1927), whose texts (which follow extensive commentaries) fill in further gaps. No all-inclusive collection comparable to the latest Dareste exists with texts in English, but satisfactory English versions of most of the world's constitutions of the last twenty years exist, and these will be mentioned in the chapter bibliographies.

There are a few very useful volumes of constitutional documents or extracts from documents made with special ends in view, which also come into the general field, such as

16. NEWTON, A. P., *Federal and Unified Constitutions*. "A Collection of Constitutional Documents for the Use of Students" (London, 1923), wherein 40 pp. of historical introduction are followed by 28 texts, all in English except the Swiss Federal Pact of 1815 and constitution of 1874, of which the official French texts are printed. The documents stretch from the Swiss Perpetual League of 1291 to the German Weimar constitution of 1919, and include the United States and the Confederate States constitutions, the German Imperial Constitution of 1871, the Brazilian constitution of 1891, and the constitutions and related documents of the British Dominions. There is also, with all texts in French,
17. AULARD, A., and MIRKINE-GUETZÉVITCH, B., *Les déclarations des droits de l'homme* (Paris, 1929), extracted from a large number of constitutions.

Mention should also be made of the great German serial publication of constitutional monographs, commentaries and texts (all in the German language) which has been appearing since the year 1907 under the general title of

18. *Das öffentliche Recht der Gegenwart* (edited originally by JELLINEK, G., LABAND, P., and PILOTY, R., Tübingen, 1907 ff.). This was a continuation in a revised form of the classic
19. *Handbuch des öffentlichen Rechts der Gegenwart*, started by H. von MARQUARDSEN in 1883 (ed. SEYDEL, M., and PILOTY, R., Tübingen, 1883-1907).

## II. GENERAL COMMENTARIES

Of the very large number of general commentaries which give a comparative or serial treatment to selected groups of modern constitutions, or which investigate particular political institutions or constitutional developments over a wide field, the following list, arranged roughly in order of date of publication, seeks to be representative only. It contains certain books of importance in the development of the study of comparative government that have, for the purposes of the student, long since been superseded, and others which are important more for the exposition of a point of view than for their enduring qualities as scholarly commentaries, but all are books in which the writer has found significant contributions to a fuller understanding of modern constitutions and their relationships. Most of these works will re-appear in the chapter bibliographies, to be recommended for special purposes, but it is for their general usefulness that they are listed here.

20. DE LOLME, J. L., *Constitution de L'Angleterre en État du Gouvernement Anglais, comparé avec la forme républicaine et avec les autres monarchies de l'Europe* (2 vols., Geneva, 1790. The first edition had been published in Amsterdam in 1771, and an English translation in 1772.) A somewhat uncritical appreciation of British institutions as contrasted with the *ancien régime* on the Continent. Many later reprints.
21. DE LA CROIX, J. V., *Constitutions des principaux États de l'Europe et des États Unis d'Amérique* (the third edition, in six volumes, was published in Paris in 1793, but an English translation of an earlier edition appeared in London, in two volumes, in 1790, under the title *Review of the Constitutions of the Principal States of Europe and of the United States of America. Given originally as Lectures. . . . Now first translated from the French.*)
22. CONSTANT, B., *Cours de droit constitutionnel* (Paris, 1814).
23. TREITSCHKE, H. VON, *Die Politik : Vorlesungen von Heinrich von Treitschke* (ed. CORNICELIUS, M., 2nd edn. in 2 vols., Leipzig, 1900). Based on lectures delivered in Berlin between 1874 and 1896. English translations and expositions of extracts from *Die Politik* are given in DAVIS, H. W. C., *The Political Thought of Heinrich von Treitschke* (London, 1914).
24. JELLINEK, G., *Allgemeine Staatslehre* (3rd edn., ed. JELLINEK, W., Berlin, 1914).

25. ESMEIN, A., *Éléments de droit constitutionnel français et comparé* (8th edn., ed. NÉZARD, H., 2 vols., Paris, 1927-30).
26. DUGUIT, L., *Traité de droit constitutionnel* (2nd edn., revised by the author, 5 vols., Paris, 1921-25; 3rd edn., 1927-36). Duguit died in 1928. *Law in the Modern State*, a translation (by LASKI, F. and H., London, 1921) of one of his shorter works, provides a useful introduction to his attitude toward sovereignty and the state, and therefore to his *Traité*.
27. BORGEAUD, G., *Établissement et révision des constitutions en Amérique et en Europe* (Paris, 1893; English translation by HAZEN, C. D., 1895).
28. LOWELL, A. L., *Governments and Parties in Continental Europe* (2 vols., Cambridge, Mass., 1896), remains valuable, but his
29. *Governments of France, Italy and Germany* (1914), and again his
30. *Greater European Governments* (2nd revised edn., New York, 1925) bring some of its material more up to date.
31. FISHER, H. A. L., *The Republican Tradition in Europe* (London, 1911).
32. BRYCE, J. (Viscount), *Modern Democracies* (2 vols., London and New York, 1921).
33. HASBACH, W., *Die parlamentarische Kabinettsregierung* (Leipzig, 1919).
34. REDSLOB, R., *Die parlamentarische Regierungsform* (Tübingen, 1918. French trans., 1924). Compare with
35. BURDEAU, G., *Le Régime Parlementaire dans les Constitutions Européennes d'après Guerre* (Paris, 1932), which is more comprehensive.
36. JENKS, E., *The State and the Nation* (revised edition, London, 1935, with new chapter on "Post-War Developments").
37. LASKI, H. J., *Grammar of Politics* (London, 3rd edn., 1934).
38. MACIVER, R. M., *The Modern State* (Oxford, 1926).
39. RUGGIERO, G. DE, *History of European Liberalism* (trans. from the Italian by COLLINGWOOD, R. E., London, 1927). A unique book, of very great value to those embarking on the comparative study of modern governments. Has an excellent critical bibliography.
40. HEADLAM-MORLEY, A., *The New Democratic Constitutions of Europe* (London, 1929). Useful bibliography but no index.
41. RAY, P. O., *Major European Governments* (Boston, 1931), with excellent bibliographical lists, including articles as well as books.

42. FINER, H., *Theory and Practice of Modern Government* (2 vols., London, 1932). Of incomparable solidity, but his earlier *Foreign Governments at Work* (London, 1921) still remains useful.
43. LAVERGNE, B., *Le gouvernement des démocraties modernes* (2 vols., Paris, 1933). Interesting for comparison with BRYCE (32).
44. ZURCHER, A. J., *The Experiment with Democracy in Central Europe* (New York, 1933). Extends also to the Russian succession states. Good bibliographical lists and model analytical index.
45. BUELL, R. L. (ed.), *New Governments in Europe. The Tendency Toward Dictatorship* (New York, 1934. Revised edn., New York, 1937), treating Italy, Germany, the three Baltic states and Finland, Poland, the Soviet Union and Spain.
46. BUELL, R. L. (ed.), *Democratic Governments in Europe* (New York, 1935). A companion volume dealing with Britain, France and Switzerland.
47. FORD, G. S. (ed.), *Dictatorship in the Modern World* (Minneapolis, 1935). Draws the net wider than Europe alone. To be compared with the essay by KANTOROWICZ (4), which does not.
48. LASKI, H. J., *The State in Theory and Practice* (London, 1935). Another last word, but stimulating as always.
49. BORNHAK, C., *Genealogie der Verfassungen* (Abhandlungen aus dem Staats- und Verwaltungsrecht. Heft 50, Breslau, 1935). Presents a grouping of modern constitutions since 1787 slightly different from that adopted here, and reaches a dogmatic conclusion not fully in keeping with the breadth of the rest of the study, but has been of the greatest value as a "control" in the preparation of the present work, and should serve a similar purpose to its readers.
50. WITMAN, S. L., *Visual Outline of Comparative Government* (New York, 1935). An interesting attempt to summarize certain current governmental systems in the form of a series of charts. Forty-four charts, with explanatory notes, cover the United Kingdom, the British Empire, France, Germany (both Weimar and the Third Reich), Italy, the U.S.S.R., Switzerland and Czechoslovakia. British local government and the Italian corporative organization respond particularly well to such a treatment.
51. CLOKIE, H. M., *The Origin and Nature of Constitutional Government* (London, 1937). Another contrasting classification of



constitutions since 1789, which takes British institutions as the focal point. Brief study with useful notes but no bibliography.

52. MUNRO, W. B., *The Governments of Europe* (3rd edn., New York, 1938) devotes nearly half its space to Great Britain, but also covers France, Germany, Italy and Russia in detail and has a chapter on Japan. Excellent bibliographies.
- 52A. GIRAUD, E., *Le pouvoir exécutif dans les démocraties d'Europe et d'Amérique* (Paris, 1938), an important work appearing too late to be used here, gives a detailed analysis of different types of contemporary democracies, classifying them as "presidential", "directorial", and "parliamentary". Compare with BRYCE (32) and LAVERGNE (43).

### III. YEARBOOKS AND ALMANACS

Much useful information concerning constitutions current during their year of publication can be obtained from such compilations. Among the most useful from this point of view (though not all, despite their names, appear regularly) are the *America Yearbook*, the *Annuaire Interparlementaire*, the *Europa Yearbook*, the *Near East Yearbook*, the *Japan-Manchukuo Yearbook*, the *Swedish Yearbook* and the *World Almanac*, but by far the best is

53. *The Statesman's Yearbook* (ed. EPSTEIN, M., London. Annual volume appears May or June). The sections on the government of the various countries of the world, though brief, give excellent outlines, completely up to date and thoroughly reliable. The bibliographical lists are somewhat miscellaneous, but are also very useful.

# CHAPTER BIBLIOGRAPHIES

*These are select or sample bibliographies and aim nowhere at being exhaustive. It is assumed that full use will be made of the detailed bibliographical information to be found in many of the works here listed.*

## PART I

### CHAPTER II. THE UNITED STATES OF AMERICA

54. FARRAND, M., *Records of the Federal Convention of 1787* (3 vols., New Haven, 1911. Re-issue revised, in 4 vols., 1937), is most comprehensive, but an accessible separate text of
55. *Madison's Notes* (ed. HUNT, G., and SCOTT, J. B.) has been published, together with other useful material, in a volume of the Carnegie series (Oxford, 1920). The best annotated edition of
56. *The Federalist* (HAMILTON, MADISON and JAY — quoted pp. 19, 20 twice, 23 and 26) is that of FORD, P. L. (New York, 1898), but the full text is to be found in a volume of "Everyman's Library".
57. POORE, B. P., *The Federal and State Constitutions, Colonial Charters and other Organic Laws of the United States, compiled under order of the U.S. Senate* (2nd edn., 2 vols., Washington, 1878), remains a documentary mine. There is also a later edition (same title, ed. THORPE, F. N., Washington, 1909) in 7 volumes.

Secondary works on the background of the constitution and of a general nature, include the classic

58. FISKE, J., *The Critical Period of American History, 1783-1789* (Boston, 1888), with which may be compared a more recent survey,
59. NEVINS, A., *The American States during and after the Revolution, 1775-89* (New York, 1924), which has a useful bibliography. More specialized in approach, but immensely stimulating, are
60. ADAMS, R. G., *Political Ideas of the American Revolution* (Durham, N. Car., 1922),
61. BECKER, C., *The Declaration of Independence* (New York, 1922), and

62. McLAUGHLIN, A. C., *Foundations of American Constitutionalism* (New York, 1933), the arguments of all of whom are neatly summarized and synthesized by
63. HUMPHREYS, R. A., *The Rule of Law and the American Revolution* (*Law Quarterly Review*, Vol. LIII, No. CCIX, pp. 80-98, London, January, 1937).

For the making of the constitution itself there are

64. FARRAND, M., *The Framing of the Constitution of the United States* (New Haven and London, 1913 — quoted p. 19) and the relevant chapters of
65. McLAUGHLIN, A. C., *Constitutional History of the United States* (New York, 1935), while a monograph study of great influence upon later constitutional studies and research was
66. BEARD, C. A., *An Economic Interpretation of the Constitution of the United States* (New York, 1913, 2nd edn., New York and London, 1936—with a new preface defending the work from various criticisms, especially those of T. C. Smith made at the Annual Conference of the American Historical Association, January 1934 — quoted p. 13).
67. BEARD, C. A., *The Economic Origins of Jeffersonian Democracy* (New York, 1915) uses a similar technique in an interpretation of the first decade of the régime of the constitution.

Commentaries upon the United States constitution and upon the governmental system that has developed under it are legion, but the four works mentioned on p. 25 together give a continuous picture of the revaluations of succeeding generations. *The Federalist* (56) was followed, at intervals of roughly half a century, by

68. TOCQUEVILLE, A. DE, *De la démocratie en Amérique* (Paris, 1835. Frequently reprinted and translated into many languages. The French edition of 1848 is specially interesting because of its new introduction referring to the French Revolution of that year),
69. BRYCE, J. (Viscount), *The American Commonwealth* (London and New York, 2 vols., 1888. Revised edn., 1910 — quoted pp. 21 and 23), and
70. BROGAN, D. W., *The American Political System* (London, 1933. The American edition appeared in the same year under the title of *We The People*). On a very much less comprehensive scale than any of these, but extremely penetrating and stimulating, is the little book of an American scholar (Tocqueville was French, and Bryce and Brogan were British),
71. MCBAIN, M. L., *The Living Constitution* (New York, 1928 — quoted pp. 27 and 29).

(*The Bibliographies to Chapters XVII and XXVIII contain further material concerning the United States of America.*)

## CHAPTER III. THE FIRST FRENCH REPUBLIC

HILL's bibliographical article (1) on *The Constitutions of Continental Europe, 1789-1813*, which discusses secondary works as well as collections of texts and legislative proceedings, mentions all the important titles. Other bibliographical articles, also published in the *Journal of Modern History*, that will be found useful, but more particularly for filling in the background of this chapter, are

72. GOTTSCHALK, L., *Studies since 1920 of French Thought in the Period of the Enlightenment* (Vol. IV, No. 2, June 1932, pp. 242-260),
73. SHAFER, B. C., *Bourgeois Nationalism in the Pamphlets on the Eve of the French Revolution* (Vol. X, No. 1, March 1938, pp. 31-50), covering pamphlets published during the eighteen months preceding the meeting of the States-General, claimed to rival the *Cahiers* in significance, and
74. BOURNE, H. E., *A Decade of Studies in the French Revolution (1919-1929)* (Vol. I, No. 2, June 1929, pp. 256-279), a decade during which appeared the last works of Aulard and Mathiez published before their deaths.

The existence of these recent bibliographies makes a long bibliographical list superfluous, and only a few of the most essential and significant works will here be separately noticed.

75. DUGUIT, L., and MONNIER, H., *Les Constitutions et les principales lois politiques de la France depuis 1789*, "Collationnées sur les Textes Officiels, précédées de Notices historiques et suivies d'une Table Analytique détaillée" (Paris, many editions, each including revision up to date of publication, edition used dated 1932) is the definitive collection of French constitutional texts, and the very long historical introduction is in itself a work of great value. Complete references to the "Textes Officiels" are given. (Quoted p. 60.)
76. ANDERSON, F. M., *Constitutions and other Select Documents illustrative of the History of France, 1789-1901* (Minneapolis, 1908) gives renderings into English of some of these texts, while
77. LEGG, L. G. W., *Select Documents illustrative of the History of the French Revolution. The Constituent Assembly* (2 vols., Oxford, 1905), though confining itself to the years 1789-91 and giving all documents in the original French, includes many extracts from contemporary newspapers (which are usefully discussed in the introduction) and other material (such as the official summary of the *Cahiers* and the king's

manifesto on the occasion of his flight to Varennes) that is beyond the scope of DUGUIT and MONNIER (75).

78. BURKE, E., *Reflections on the Revolution in France* (London, 1790. Many times reprinted, but perhaps most conveniently for the student of the French Revolution in "The World's Classics", with Burke's *Letter to a Member of the National Assembly*, 1791, and his *Thoughts on French Affairs*, 1791, in the same volume) and
79. PAINE, T., *Rights of Man* (London, 1791. Many times reprinted, and in "Everyman's Library") though so well known, demand special mention here for their respective attack upon and defence of the Declaration of the Rights of Man and the new French constitution under preparation as they wrote. A modern essay upon the Declaration of the Rights of Man which has already become a classic, is that of
80. JELLINEK, G., *Die Erklärung der Menschen- und Bürgerrechte* (4th edn., Munich, 1927. Engl. trans. by FARRAND, M., as *The Declaration of the Rights of Man*, New Haven, 1901), and this in its turn can be compared with the comparative study by AULARD and MIRKINE-GUETZÉVITCH (17).
81. AULARD, A., *Histoire Politique de la Révolution Française* (1789-1804—Paris, 1900. Engl. trans., by MIALL, B., in 4 vols., London and Leipzig, 1910) is another classic that cannot yet be considered as entirely superseded by the later works of MADELIN, MATHIEZ, SAGNAE and others, which are adequately discussed in the bibliographies (1, 69 and 71) cited.
82. DESLANDRES, M., *Histoire Constitutionnelle de la France, 1789-1870* (2 vols., Paris 1932) is a recent work treating institutional developments on an adequate scale.

Three recent works in English that have considerable value to the student of the constitutional history of the French Revolution, though not confined to this aspect, are

83. HYSLOP, B. F., *French Nationalism in 1789 according to the General Cahiers* (New York, 1934),
  84. THOMPSON, J. M., *Robespierre* (2 vols., Oxford, 1935), and
  85. GARRETT, M. B., *The Estates General of 1789* (New York, 1936), with which may be compared an earlier German work,
  - 85A. REDSLOB, R., *Die Staatstheorien der französischen Nationalversammlung von 1789* (Leipzig, 1912).
- (Bibliographical references for the Satellite States of the First French Republic will be found in the Bibliography to Chapter VI.)

## CHAPTER IV. INSPIRATION OF FRANCE AND AMERICA

For the "Brabançon" constitution of the "Belgian United States" of 1790 see HILL's bibliographical article (1). For background,

86. PIRENNE, H., *Histoire de Belgique* (5th edn., 6 vols., Brussels 1929) is useful, though his treatment of this particular episode is not very penetrating. A stimulating monograph is
87. GORMAN, T. K., *America and Belgium. A Study of the Influence of the United States upon the Belgian Revolution of 1789-90* (London and New York, 1925).

Latin American constitutions and constitutional development receive voluminous bibliographical notice in DARESTE (2). Volume IV of the fourth edition is devoted to those current in the year 1932, and the three earlier editions contain texts of many more Latin American constitutions now no longer in force. MIRKINE-GUETZÉVITCH (10) provides an alternative here to the latest Dareste, but is less exhaustive.

88. RODRIGUEZ, J. I., *A Compilation of the Political Constitutions of the Independent Nations of the New World* (3 vols., Washington, 1907. U.S. Government Printing Office) gives virtually all Latin American constitutions in force in 1907 in their original versions and in English translations. DODD (11) improved upon the translations and brought the constitutions more up to date a year or so later in the cases of the Argentine, Brazil, Chile and Mexico. A general Latin American bibliography that is of value to the student of constitutional developments, but which does not include recent works, is
89. GOLDSMITH, P. H., *A Brief Bibliography of the Books in English, Spanish and Portuguese relating to the Republics commonly called Latin American*, "with comments" (New York, 1915). The bibliographies to the two excellent works by
90. ROBERTSON, W. S., *History of the Latin American Nations* (Revised edn., New York, 1932) and *Rise of the Spanish American Republics* (New York, 1928) may be used to supplement Goldsmith in a more selective field. Other secondary works that were found specially illuminating for governmental developments were
91. BRYCE, J. (Viscount), *South America, Observations and Impressions* (London and New York, 1914), as well as his *Modern Democracies* (32), especially Vol. I, Ch. 17 — quoted pp. 46<sup>i</sup> and 46-47 — and J. F. Rippy's chapter on "Dictatorships

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*Note* : "quoted p. 46<sup>i</sup>" indicates that it is the first quotation on page 46 of the present work that is taken from the work cited.

in Spanish America " in FORD'S *Dictatorship* (47 — quoted pp. 46<sup>ii</sup> and 47<sup>i</sup>).

92. KIRKPATRICK, F. A., *Latin America* (Cambridge, 1938), a long-awaited work, appeared too late to be used here, but it pays considerable attention to constitutional developments.
93. MECHAM, J. L., *The Ministry of State in Latin America* (an article in *The Southwestern Political and Social Science Quarterly*, Vol. VIII, No. 2, Austin, Texas, Sept. 1927. Reprinted separately) is an invaluable and erudite essay which helps to offset some of Rippey's flamboyance, as well as that of
94. HAMBLOCH, E., *His Majesty the President — A Study of Constitutional Brazil* (London, 1935 — quoted pp. 48 and 49), which ranges far beyond Brazil and sometimes on to very debatable ground, but which is stimulating if used with caution. Hambloch has also published reliable and handy translations into English (together in one pamphlet, São Paulo, Brazil, 1934) of the Brazilian constitutions of 1891 and 1934. The imperial Brazilian constitution of 1824 is printed in the first edition of DARESTE (2) and that of 1891 in the three later editions.

For the background of Portuguese constitutional history see the best modern general history of Portugal :

95. LEGRAND, T., *Histoire du Portugal de l'onzième siècle à nos jours* (Paris, 1928). PÖLITZ (5) prints the Portuguese constitutions of 1822, 1826 (in Vol. III) and 1838 (in Vol. IV) in German, and DODD (11) that of 1826 in English, with amendments to 1909.

For Spanish political and legal institutions there is

96. RAUCHHAUPT, F. W. VON, *Geschichte der spanischen Gesetzquellen* (Heidelberg, 1923) and the more general background can be found in
97. HUME, M. A. S., *Modern Spain, 1788-1918* (revised edn., London, 1925). HILL's bibliography (1) covers the constitutions of 1808 and 1812. Much constitutional information can be obtained from the special edition of the section on Spain in the great Spanish Encyclopaedia, "Enciclopedia Espasa":
98. *España. Estudio geográfico, político, histórico, científico literario, artístico y monumental* ("edición especial del tomo XXI de la Enciclopedia Espasa". Tercera edición. Madrid, 1935).

The Norwegian constitution of 1814 is printed in most of the important general collections of constitutional texts, including those numbered in this bibliography 2, 5, 6, 11, 14 and 18. Of the separate English translations, that of

99. BRAEKSTAD, H. L., *The Constitution of the Kingdom of Norway* (London, 1916) may be mentioned for its useful commentary. DARESTE (2) provides an extensive special bibliography of native and foreign works on this constitution and its régime.

(*The Bibliography to Chapter XXVII contains further material concerning Spain and Portugal.*)

## PART II

### CHAPTER V. CONSTITUTIONAL ABSOLUTISM OF YEAR VIII

HILL's bibliography (1) and DUGUIT and MONNIER's collection of texts (75) cover Bonapartist Constitutionalism comprehensively, though the former stops with the year 1813. ANDERSON (76) translates the Bonapartist constitutional documents into English. A *Journal of Modern History* bibliographical article,

100. DUTCHER, G. M., *Napoleon and the Napoleonic Period* (Vol. IV, No. 3, Sept. 1932, pp. 446-462), usefully discusses recent general Napoleonic studies excluded by Hill's terms of reference, and also includes the years after 1813.

Among secondary works DESLANDRES (82) continues useful, and of the general histories the classic

101. VANDAL, A., *L'avènement de Bonaparte* (2 vols., Paris, 1903-1905) can now be compared with  
 102. MADELIN, L., *Le Consulat et L'Empire* (Paris, 1932. English trans. in 2 vols. by BUCKLE, E. F., London, 1934-36), though the scale of the latter is smaller than Vandal's for the years they both cover (1799-1804).  
 103. ESMEIN, A., *Précis de l'histoire du droit français de 1789 à 1814* (Paris, 1908) is an invaluable signpost through the revolutionary and Bonapartist legal reforms.

The following works, of a more general nature, were made use of for purposes of quotation in this chapter :

104. FISHER, H. A. L., *Napoleon* ("Home University Library", London and New York, 1912 — quoted p. 64<sup>iii</sup>), an admirable *hors d'œuvre*.  
 105. BOURRIENNE, F. DE, *Mémoires de Napoléon Bonaparte* (10 vols., Paris, 1829-31. Several English translations in numerous editions, including an abridged translation first published in London in 1836 and reprinted in one volume in 1905 — quoted p. 61), depicting Napoleon as seen by his boyhood friend, later his secretary, and



106. GUEDALLA, P., *The Second Empire* (London, 1922 — quoted p. 64<sup>1</sup>), which, despite its title, also has a lot to say about the First Empire and its foundations.

## CHAPTER VI. THE NAPOLEONIC SPHERE OF INFLUENCE

HILL's bibliography (1) continues to be of great value, and most exhaustively comprehends the Napoleonic sphere of constitutional influence. For secondary reading and for further bibliographical information on detailed matters the relevant parts of the classic

107. SOREL, E., *L'Europe et la Révolution Française* (8 vols., Paris, 1885-1904), can now be supplemented by the equally monumental
108. DRIAULT, E., *Napoléon et l'Europe* (5 vols., Paris, 1910-27).
- PÖLITZ (5) prints German versions of nearly all the constitutions of the Napoleonic sphere of influence, and French versions appeared in
109. *Le Moniteur Universel* (Paris, 1789-1868. At first named *La Gazette Nationale*). The files of this unique "official newspaper" are invaluable to the student of the Napoleonic period, during which, at times, it alone, of all the French (or indeed of the European) press, enjoyed the favour of the régime.

For Switzerland during this phase

110. KAISER, S., and STRICKER, J., *Geschichte und Texte der Bundesverfassungen der schweizerischen Eidgenossenschaft, von 1798 bis zur Gegenwart* (Bern, 1901) is a modern alternative to PÖLITZ (5), with more extensive commentary, and there is also a separate study by Stricker of the Directorial republic,
111. STRICKER, J., *Die helvetische Revolution, 1798, mit Hervorhebung der Verfassungsfragen* (Frauenfeld, 1898).

The standard history of the Netherlands,

112. BLOK, P. J., *Geschiedenis van het nederlandsche Volk* (4 vols., Leyden, 2nd edn., 1912-15. English trans. of 1st edn., London, 1898-1912) is the best general account of constitutional developments during this period, but a special study,
113. COLLENBRANDER, H. T., *De bataafsche Republiek* (Amsterdam, 1908) is more detailed. Compare with this an earlier work,
- 113A. LEGRAND, P., *La révolution française en Hollande. La république Batave* (Paris, 1894).

The constitutions are all in PÖLITZ (5), but the *Moniteur Universel* (109) omits that of 1798.

- Texts of nearly all the Italian constitutions of this period —PÖLITZ (5) of course has German versions—are printed in
114. *Raccolta di costituzione italiana* (Turin, 1852). For the others see HILL (1), whose bibliography is particularly good on the Italian side. Monographs dealing with the earlier period are
  115. GAFFAREL, P., *Bonaparte et les républiques italiennes, 1796-1799* (Paris, 1895), and
  116. PINGAUD, A., *La domination française dans l'Italie du nord* (2 vols., Paris, 1914), with a good bibliography, while for the later period there is
  117. DRIAULT, E., *Napoléon en Italie, 1800-1812* (Paris, 1906). The Parthenopæan republic was the subject of an early work of
  118. CROCE, B., *Studi Storici sulla rivoluzione napoletana dell'anno 1799* (Rome, 1897; 3rd edn., Bari, 1912), and for Naples generally there is his well-known *Storia del regno di Napoli* (Bari, 1925). On Sicily there is a useful article by
  119. LACKLAND, H. M., *The failure of the constitutional experiment in Sicily, 1813-14* (*English Historical Review*, Vol. XLI, 1926, pp. 210-236).

The constitutions of Germany are all to be found in Volume I of PÖLITZ (5), and the most important documents from 1806 onward in ALTMANN (7), as well as in the earlier collection of

120. WEIL, K., *Quellen und Aktenstücke zur deutschen Verfassungsgeschichte seit 1806* (Leipzig, 1850). Of the extensive monograph material, three works in English,
121. GOOCH, G. P., *Germany and the French Revolution* (London, 1920), invaluable for the background period,
122. ARIS, R., *History of Political Thought in Germany* (London, 1936), and
123. FISHER, H. A. L., *Studies in Napoleonic Statesmanship: Germany* (Oxford, 1903 — quoted p. 76), are among the best of the more general studies. More specialized in content are such works as
124. SERVIÈRES, G., *L'Allemagne française sous Napoléon I* (Paris, 1904) and
125. BECK, C., *Zur Verfassungsgeschichte des Rheinbunds* (Mainz, 1890), while as a general survey from 1806 to 1814, the first volume of
126. TREITSCHKE, H. VON, *Deutsche Geschichte im 19. Jahrhundert* (5 vols., Leipzig, 1879-94. English translation, only reasonably satisfactory, by PAUL, E. and C., 7 vols., 1915-19 —

quoted p. 76) has yet to be surpassed, though its prejudices are many, and at times violent.

PÖLITZ (5) has the Polish constitution of 1791 in German but ALTMANN (7) excludes it. A contemporary English translation :

127. *New Constitution of the Government of Poland, established by the Revolution of the third of May 1791* (London, 1791) was probably that used by Edmund Burke as the basis for his praises in his *Appeal from the New to the Old Whigs* and for his criticisms in his *Thoughts on French Affairs* — quoted p. 79 — but it is claimed not to be very reliable. With Burke's views it is interesting to compare those expressed on the subject of the ancient Polish constitution by John C. Calhoun in *A Disquisition on Government* — quoted p. 78, via MCBAIN and ROGERS (13). For Poland in process of dissolution at this period, an excellent study is
128. LORD, R. H., *The Second Partition of Poland* (Cambridge, Mass., 1915), while a masterly brief history of Poland is
129. PHILLIPS, W. A., *Poland* ("Home University Library", London and New York, 1915. Revised edn., 1929—quoted p. 80). An old comparative study,
130. LELEWAL, K., *Analyse et parallèle des trois constitutions [polonaises] de 1791, 1807 et 1815* (Arras, 1833), remains useful.

The Spanish constitution of 1808 is in PÖLITZ (5) in German and in the *Moniteur Universel* (109) in both French and Spanish, and the impact of Napoleon I on Spain is dealt with at length in

131. GRANDMAISON, G. DE, *Espagne et Napoléon* (3 vols., Paris, 1908-31), containing official documents. Further, see *Bibliography* to Ch. IV, and HILL (1).

## CHAPTER VII. POSTSCRIPT TO BONAPARTISM

DUGUIT and MONNIER (75) print all important constitutional texts for both the First and the Second Empire. The Napoleonic constitutional legend is best traced through the

132. *Correspondance de Napoléon I* (32 vols., Paris, 1858-70),
133. CASES, LAS (Count of), *Mémorial de Sainte-Hélène* (4 vols., London, 1823. 4th edn., Brussels, 1828) and
134. BONAPARTE, LOUIS-NAPOLÉON (later NAPOLEON III), *Les Idées Napoléoniennes* (Paris, 1839), to which GUEDALLA's *Second Empire* (106 — quoted p. 85) provides a sprightly, and

135. FISHER, H. A. L., *Bonapartism* (Oxford, 1908) a more sober introduction.

A curious aspect of the constitutional intrigues of 1814-15 in France has recently been uncovered by the publication of

136. *Benjamin Constant's 'Projet' for France in 1814* (by SCOTT, F. D., in the *Journal of Modern History*, Vol. VII, No. 1, March 1935, pp. 41-48) which envisaged Bernadotte as Napoleon's successor on the French throne, and which Bernadotte himself approved and amended in February 1814. The ideas in this *Projet* should be compared with Constant's views as expressed in his *Cours* (22).

A *Journal of Modern History* bibliographical article,

137. SCHNERB, R., *Napoleon III and the Second Empire* (Vol. VIII, No. 3, Sept. 1936, pp. 338-355) is extremely comprehensive, discussing not only such earlier monuments as
138. OLLIVIER, E., *L'Empire Libéral* (16 vols., Paris, 1894-1912), and LA GORCE, P. DE, *Histoire du Second Empire* (7 vols., Paris, 1894-1905), but more recent publications of every sort.
139. MARX, K., *Der Achtzehnte Brumaire des Louis Bonaparte* (New York, 1852. Engl. trans., New York, 1889), an example of the inspired journalism which Marx produced during his early years of penury in London, points and drives home a significant historical parallel.

### PART III

#### CHAPTER VIII. LEGITIMISM IN THEORY AND PRACTICE

The development and ramifications of the theory of Legitimism still await really satisfactory specific treatment. Perhaps the best approach both to the theory and to its literature is through a masterly biographical study,

140. SRBIK, H. (Ritter) VON, *Metternich* (2 vols., Vienna, 1925). A convenient summary in English of Srbik's treatment of his subject, together with an appreciation of the work of Bibl and others, is contained in an essay on Metternich in
141. WOODWARD, E. L., *Three Studies in European Conservatism* (Oxford, 1928). Legitimist theory is briefly dealt with in a general way by RUGGIERO (39), by
142. WEBER, A., *Die Krise des Modernen Staatsgedankens in Europa* (Stuttgart, 1925) and by
143. FISHER, H. A. L., *A History of Europe* (Vol. III — *The Liberal Experiment*, London, 1935. The three volumes of

this work have since been re-issued as one), while Legitimism in action is the subject of a general study,

144. PHILLIPS, W. A., *The Confederation of Europe* (London, 1920) which now (like A. W. Ward's excellent bibliography for the period of the Congress of Vienna in *The Cambridge Modern History*, Vol. IX, 1906, pp. 867-875), while still valuable, has become rather out of date, following the vast mass of recent publications on this period. Dealing more directly with constitutional issues, BORNHAK (49) has an illuminating chapter (Ch. IV) on "Der Verfassungskreis von 1814" — quoted p. 97.

For the years from 1814 onwards documents published in

145. *British and Foreign State Papers* (Foreign Office Publications, London, 1819 ff.) give much material of constitutional importance, including the texts of treaties (such as the Final Act of the Congress of Vienna) and continental constitutions. For an understanding of motives and policies of the whole Congress period, the diaries of the "Congress-Secretary",
146. GENTZ, F. VON, *Tagebücher, 1800-1828 . . . aus dem Nachlass Varnhagen's von Ense* (Leipzig, 1861. Revised edn., 4 vols., Leipzig, 1873-74) are of first importance.

The Swedish constitution of 1809, as befits the *doyenne* of surviving European written constitutions, is printed in most of the important collections and in many languages — in English in DODD (11) and *Select Constitutions* (14), in French in DARESTE (2), in German in PÖLITZ (5). An accessible modern text in Swedish, with amendments and commentary and the most important constitutional laws, is

147. MALMGREN, R., *Sveriges grundlagar och tillhörande författningar med förklaringar* (2nd edn., Stockholm, 1926). An older standard commentary,
148. FAHLBECK, P. E., *Sveriges författning och den moderna parlamentarismen* (Lund, 1904) has been translated into both French (Paris, 1905) and German (1911). An appreciation of Sweden's contemporary governmental trends is to be found in
149. CHILD, M. W., *Sweden : The Middle Way* (New Haven, 1936).
- 149A. AFZELIUS, N. A., *A Bibliographical List of Books in English on Sweden and Literary Works Translated into English from Swedish* (Stockholm, 1936) is extremely useful.

#### CHAPTER IX. LEGITIMISM IN FRANCE

To DUGUIT and MONNIER (75), ANDERSON (76), PÖLITZ (5) and ALTMANN (6), who give the texts, and to DESLANDRES

- (82), should be added, for the period of the Restoration in France,
150. BARTHÉLÉMY, J., *L'Introduction du régime parlementaire en France sous Louis XVIII et Charles X* (Paris, 1908) an excellent survey. The contemporary works of CONSTANT (22 and 136) and of
  151. CHATEAUBRIAND, F. R. (Vicomte de), *De Bonaparte, des Bourbons, et de la nécessité de se rallier à nos princes légitimes* (Paris, 1814) and *De la monarchie selon la charte* (Paris, 1816), two famous pamphlets which had the respective effects of raising Chateaubriand's political fortunes to their dizzy heights and (during the ultra-Royalist reaction) plunging them to their lowest depths, give a good idea of the attitude of the moderate constitutionalists. That of the right and the left extremists has been examined by
  152. HUDSON, N. E., *Ultra-Royalism and the French Restoration* (Cambridge, 1936) and by
  153. WEILL, J. G., *Histoire du parti républicain en France, 1815-1870* (Paris, 1900). For the Bonapartists see the *Bibliography* to Chapter VII generally, and titles 132-135 in particular.

## CHAPTER X. LEGITIMISM IN GERMANY

- PÖLITZ (5), whose first volume is devoted to German constitutional documents (supplemented after 1833 by Vol. IV), ALTMANN (7 — Vol. I, and 8 — Vol. II) and WEIL (120) give the texts in German, the first three editions of DARESTE (2) give texts in French of those German constitutions of this period which survived into the Hohenzollern-Bismarckian empire, while the fourth edition continues (Vol. I, pp. 99-266) to give valuable bibliographical information concerning them, whenever it prints later constitutional texts of the states concerned. A comprehensive collection in English of the texts of German constitutions before 1848 does not appear to exist, and many of them do not seem to have been translated into English.
154. HARTUNG, W., *Deutsche Verfassungsgeschichte vom 15. Jahrhundert bis zur Gegenwart* (3rd edn., Leipzig, 1928), with its excellent bibliographies, and the general histories of TREITSCHKE (126 — quoted twice, p. 113).
  155. DENIS, E., *L'Allemagne, 1810-1852* (Paris, 1899) and
  156. WARD, A. W., *Germany, 1815-90* (Vol. I, 1815-52, Cambridge, 1916), also with a detailed bibliography, are all valuable and the celebrated study by

157. MEINECKE, F., *Weltbürgertum und Nationalstaat. Studien zur Genesis des deutschen Nationalstaates* (Berlin, 1908, 7th edn., 1928) is invaluable. An excellent brief statement of the German Problem in and after 1815 is contained in the introduction to
158. ROBERTSON, C. G., *Bismarck* (London, 1915 — quoted p. 114). Contrasting as strongly in attitude with the works of German historical scholarship published during the period of the Weimar republic, as did those with the earlier productions of the Hohenzollern-Bismarckian empire, is the recent work of
159. MARCKS, E., *Der Aufstieg des Reiches. Deutsche Geschichte von 1807 bis 1871-78* (Stuttgart, 2 vols., 1936. Vol. I deals in detail with the period 1815-62), but on the other hand
160. SCHNABEL, F., *Deutsche Geschichte im neunzehnten Jahrhundert* (Freiburg i.B., in progress. Four vols. out of five published by 1938), continues to preserve its *Zeitlosigkeit* to a remarkable degree. Both are likely to rank with Treitschke, Sybel and Brandenburg as interpretations of nineteenth century Germany.

## PART IV

### CHAPTER XI. THE JULY MONARCHY IN FRANCE

The texts are the same as for Chapter IX, but as BARTHÉLÉMY (150) breaks off his study of parliamentary government in France at 1830, an older work of formidable proportions,

161. HAURANNE, P. DUVERGIER DE, *Histoire du gouvernement parlementaire en France, 1814-1848* (10 vols., Paris. 2nd edn., 1870-72) has yet to be supplanted for the July monarchy. General histories are the volumes (IV and V) by CHARLÉTY, S., in the co-operative
162. *Histoire de France contemporaine* (edited by LAVISSE, E.) and
163. BOURGEOIS, E., *Modern France, 1815-1900* (Vol. I, Cambridge, 1917). WEILL (153) continues to be useful.

With these modern accounts the blistering contemporary attack upon the *régime* of Louis Philippe by

164. BLANC, L., *Histoire de dix ans, 1830-1840* (Paris, 1842. Many subsequent editions) can be compared. The *apologia* of
165. GUIZOT, F., *Mémoires pour servir à l'histoire de mon temps* (Paris, 8 vols., 1858-61) serves less effectively as an antidote to Blanc. WOODWARD (141) has an essay on Guizot as a conservative statesman that is rather more sympathetic than

the attitude adopted toward him by GUEDALLA (106 — quoted p. 135).

From three different angles, Tocqueville's *De la démocratie en Amérique* (1835), Prince Louis Napoleon's *Les idées napoléoniennes* (1839) and Lamartine's *Histoire des Girondins* (1847) may be considered as oblique attacks upon the régime of Louis Philippe and his governments, through their praise of political ideas and constitutional devices of very different order, and these were no less effective than the direct attack of Louis Blanc. For the lighter artillery of the considerable literary war against the régime, see

166. THIEME, H. P., *Guide bibliographique de la littérature française de 1800 à 1906* (Paris, 1907).

## CHAPTER XII. THE "MODEL" STATE OF BELGIUM

The fundamental law of 1815 of the united kingdom of the Netherlands is given in German (as is also the earlier draft of 1814) by PÖLITZ (5), and in the Dutch original by

167. HASSELT, W. C. J. VAN, *Verzameling van Nederlandsche staatsregelingen en grondwetten, 1789-1887* (6th edn., ed. HARTOG, 1904), a collection of the texts of all Dutch constitutions and constitutional laws from the Batavian republic to date of publication. The régime of this fundamental law is discussed, from different points of view, by BLOK (112) and PIRENNE (86) in their large-scale histories, and Pirenne then proceeds to his account of the Belgian revolution and his memorable eulogy of the constitution of 1831 (Vol. VI, Book 4, Ch. 3 — quoted p. 140). With it should be compared BORNHAK's (49 — quoted p. 148) more reserved analysis.

The Belgian constitution of 1831 is easily accessible in many languages. DODD (11), WRIGHT (12), MCBAIN and ROGERS (13) and *Select Constitutions* (14) have it in English, DARESTE (2 — all editions) and *B. and F. State Papers* (145) in French, PÖLITZ (5) and ALTMANN (6) in German. The standard Belgian commentary,

168. ERRERA, P., *Traité de droit public belge* (2nd edn., Brussels, 1916-22), and his shorter *Sommaire du cours de droit public belge* also print the French text of the constitution.

An excellent Belgian constitutional history and commentary in English is that of

169. REED, T. H., *Government and Politics of Belgium* (New York, 1934 — quoted p. 142), and the discussion of the Belgian declaration of rights to be found in
170. DICEY, A. V., *Introduction to the Study of the Law of the Constitution* (London, 1885. 8th edn., 1915), and particularly



in chapters 5 to 7, is as illuminating as any part of that most illuminating work.

Belgium as a land of constitutional experiment is discussed by

171. CHARRIAUT, H., *La Belgique moderne : Une terre d'expériences* (Paris, 1910) and by
172. BARTHÉLEMY, J., *L'Organisation du suffrage et l'expérience belge* (Paris, 1912).

### CHAPTER XIII. LEGISLATIVE REFORM IN BRITAIN

The incomparable study of "Political Institutions" which comprises Book I of Vol. I of

173. HALÉVY, E., *Histoire du peuple anglais au XIX<sup>e</sup> siècle* (5 vols., Paris, 1913-32. English trans. by WATKIN, E. I., 1924-34. Reprint of the English version in "Pelican Books", in progress. Vol. I published in three parts, London, 1937-38) is outstanding as a survey of the British constitution on the eve of the reform era, and has been extensively used in this chapter — quoted pp. 153<sup>i</sup>, 154 twice, 160<sup>i</sup> and 160-161 — as have also the two works of
174. DICEY, A. V., *The Relation between Law and Public Opinion in England during the Nineteenth Century* (London, 1905 — quoted p. 160<sup>ii</sup>) and *The Law of the Constitution* (170). The very full bibliography at the end of Vol. I of Halévy covers the official documents, and the general works and monograph studies published up to 1912, most comprehensively. The English edition of this bibliography also contains a few of the more important titles of works published between 1912 and 1924. Some recent works of particular value and significance, not to be found in either version of Halévy's bibliography, are :
175. VEITCH, G. S., *The Genesis of Parliamentary Reform* (London, 1913),
176. BUTLER, J. R. M., *The Passing of the Great Reform Bill* (London, 1914),
177. NAMIER, L. B., *The Structure of Politics at the Accession of George III* (2 vols., London, 1929) and *England in the Age of the American Revolution*, Vol. I (London, 1930),
178. TURNER, E. R., *The Privy Council of England, 1603-1784* (2 vols., Baltimore, 1927-28) and *The Cabinet Council of England, 1622-1784* (2 vols., Baltimore, 1930-32 — a posthumous and somewhat indigestible compilation), and
179. THOMSON, M. A., *The Secretaries of State, 1681-1782* (Oxford, 1932).

Among modern works attempting a synthesis of British

constitutional history and including the eighteenth and early nineteenth centuries, the most satisfactory until very recently has been

180. ADAMS, G. B., *The Constitutional History of England* (New Haven and London, 1921. Revised edn., 1935), but its scale is inevitably restricted by having to cover from earliest times to the twentieth century in one volume. Two new works, appearing too late, unfortunately, to be made use of here, are planned on a more adequate scale :
181. THOMSON, M. A., *A Constitutional History of England, 1642-1801* (London, 1938. The fourth and, as yet, the only volume to appear of a five-volume series edited by TREHARNE, R. F.) with an admirable bibliographical appendix, and
182. KEIR, D. L., *The Constitutional History of Great Britain, 1485-1937* (London, 1938. Companion to the mediaeval volume by JOLIFFE, J. E. A.), broader and rather less thorough in treatment than Thomson, and lacking a separate bibliography, but providing an interesting contrast in method of approach.

Tocqueville's famous gibe to the effect that the English constitution simply did not exist, is repeated by DARESTE (2 — fourth edn., Vol. I, p. 517), who then proceeds to print a series of documents, ranging from the Great Charter of Henry III (A.D. 1225) to the Representation of the People Act of 1918, that may be said to possess particular significance in British constitutional development. A Japanese interpretation of "The English Constitution" (Appendix II to

183. MATSUNAMI, N., *The Constitution of Japan*, Tokyo, 1930) is to print simply the Great Charter, the Petition of Right (1628) and the Bill of Rights (1689). Indeed, any selection of British constitutional documents must of necessity be arbitrary and somewhat misleading. It is better to go directly to the great collections of printed sources, for particulars of which for this period, see the bibliographies of HALÉVY (173) and of THOMSON (181).

(*The Bibliography to Chapter XXI contains further material concerning Great Britain.*)

## PART V

## CHAPTER XIV. ITALIAN NATIONALISM

Virtually all the various Italian constitutions of the first half of the nineteenth century are printed in the *Raccolta di costituzione italiana* (114), and PÖLITZ (5) has them in German up to 1846. The Piedmontese *Statuto* of 1848 has, of course, been widely printed. ALTMANN (6) has it in Italian, DARESTE (2 — all editions) in French, DODD (11), WRIGHT (12) and McBAIN and ROGERS (13) in English. All of these print as an appendix the Law of Guarantees of 1871. McBain and Rogers refer in footnotes to the principal laws affecting different clauses of the *Statuto* that were passed up to the year 1921. Dareste (4th edn.) has a very good bibliography of constitutional writings, texts and commentaries for modern Italy. More general, but more complete for recent publications, and more up to date than Dareste's bibliography is that of

184. GREENFIELD, K. R., *Historiography of the Risorgimento since 1920* (Bibliographical article in the *Journal of Modern History*, Vol. VII, No. 1, March 1935, pp. 49-67), confined mainly to the works of Italian writers, but also discussing the principal foreign works.

The best general history of Italian unification in English remains that of

185. KING, B., *A History of Italian Unity, 1814 to 1871* (2 vols., London, 1899), but the relevant portions of two outstanding Italian works, both available in English translations, serve to supplement his discussion of the trend of ideas :
186. CROCE, B., *Storia d'Italia, 1871-1915* (Bari, 1928. Eng. trans. by ADY, C. M., Oxford, 1929) and RUGGIERO (39), while the official fascist interpretation is supplied by
187. VILLARI, L., *Italy* (Modern World Series, London, 1929 — quoted pp. 171 and 179).

(*The Bibliography to Chapter XXVII contains further material concerning the unified kingdom of Italy.*)

## CHAPTER XV. SWISS NATIONALISM

All Swiss constitutional texts of general application issued since 1798 are given in German by KAISER and STRICKER (110), while PÖLITZ also includes cantonal constitutions before 1847, and the

188. *Sammlung enthaltend die Bundesverfassung und die in Kraft bestehenden Kantonsverfassungen* (*Recueil des constitutions fédérale et cantonales*), published by the Swiss federal government, gives in its various editions and supplements appearing between 1864 and 1914 a very complete collection of texts in German, French and Italian for the period covered. Subsequent amendments are recorded in the monthly official publication
189. *Feuille fédérale de la Confédération Suisse* (Bern, 1849 ff. Also issued in German and Italian). DARESTE (2) has, in the four editions, all cantonal constitutions in force between 1883 and 1931, as well as the federal constitution of 1874 as amended from time to time, in French. DODD (11) has the federal constitution of 1874 in English and NEWTON (16) both that document and the Confederate Pact of 1815 in French.  
KAISER and STRICKER (110) have a commentary with their texts, and a good constitutional history is
190. HILTY, C., *Die Bundesverfassungen der schweizerischen Eidgenossenschaft* (Neuchâtel, 1891. Also in a French edition), while there are the general histories of
191. OECHSLI, W., *Geschichte der Schweiz im XIX. Jahrhundert* (2 vols., Leipzig, 1903-13) and *History of Switzerland, 1494-1914* (Cambridge, 1922). Including twentieth-century developments as well,
192. BROOKS, W. C., *Government and Politics of Switzerland* (New York, 1918) has been subsequently supplemented by his illuminating exposition of *Civic Training in Switzerland — A Study of Democratic Life* (Chicago, 1930). Brooks' bibliographies, and the very detailed ones in the fourth edition of DARESTE (2 — Vol. II, pp. 539-542), list a large number of titles concerned with the *minutiae* of Swiss constitutional theory and practice. BRYCE's *Modern Democracies* (32) is at its best when dealing with Switzerland (Vol. I., pp. 367-507).

## CHAPTER XVI. GERMAN NATIONALISM

The text of the Frankfurt constitution of 1849 is in WEIL (120) and ALTMANN (7 — Vol. I), the latter also printing several of the most important laws of constitutional significance passed by the Frankfurt Assembly.

TREITSCHKE (126) breaks off on the eve of the revolution of 1848, but HARTUNG (154), DENIS (155), WARD (156 — quoted p. 199), MEINECKE (157), MARCKS (159) and SCHNABEL (160) all cover it. The only thoroughly satisfactory large-

scale work devoted exclusively to the German revolution of 1848-49,

193. VALENTIN, V., *Geschichte der deutschen Revolution von 1848-1849* (2 vols., Berlin, 1930-31) contains a thorough exposition of constitutional matters and a copious bibliography. It ranks in importance for its period with SRBIK's *Metternich* (140) for that of Vienna and the *Bundesakte*. An earlier work by the same author is the best short account of the Frankfurt Parliament :
194. VALENTIN, V., *Die erste deutsche Nationalversammlung* (Munich and Berlin, 1919). The historiography of the Frankfurt Parliament and the changing interpretations of its work are discussed briefly by the present writer :
195. HAWGOOD, J. A., *The Frankfurt Parliament of 1848-49* (" Historical Revision " No. LXII, in *History*, Vol. XVII, No. 66, pp. 147-151). He has also made use, for the purposes of this chapter in particular, of his as yet unpublished study of " American Ideas and German Unity — The Movement of 1848-49 " and of his Heidelberg doctoral dissertation, *Politische und wirtschaftliche Beziehungen zwischen den Vereinigten Staaten von Amerika und der deutschen provisorischen Central-Regierung zu Frankfurt am Main, 1848-1849* (text in English, London, 1928), which, in its bibliographical introduction lists the unpublished documents in the German *Reichsarchiv* utilized there, and again here.

Owing to the relative inaccessibility (especially of the index volume, without which the work is a jungle) of the official verbatim report of the proceedings at Frankfurt,

196. *Stenographischer Bericht über die Verhandlungen der deutschen konstituierenden Nationalversammlung zu Frankfurt a.M.* (ed. WIGARD, F., 10 vols., Frankfurt, 1848-50), the excellent selection of speeches printed in one volume (with valuable introduction) by
197. WENTZKE, P., *Die erste deutsche Nationalversammlung und ihr Werk* (Munich, 1922), can be recommended for giving the flavour of the most important debates in the Assembly.

## PART VI

### CHAPTER XVII. CRISIS OF FEDERALISM IN THE UNITED STATES

Of the innumerable collections which print the American constitution of 1787 in many languages, DARESTE (2 — 4th

edn., Vol. VI) deserves special mention for its valuable bibliographical annotation (including works and articles published up to the year 1934) of the text, and particularly of the fourteenth amendment. Dareste does not, of course, print the constitution of the Confederate States, but this is easily accessible, in NEWTON (16), in

198. McDONALD, W., *Select Statutes and other Documents illustrative of the History of the United States, 1861-1898* (New York, 1903), in his
199. *Documentary Source Book of American History*, and in *British and Foreign State Papers* (145 — Vol. 51). McDONALD (198) also prints, in full or in extract, most of the important federal legislation, executive orders and proclamations of the civil war and reconstruction era, with full reference to sources.

Both TOCQUEVILLE (68) and BRYCE (69) remain extremely important, but McLAUGHLIN's *Constitutional History* (65) is not very satisfactory for the period after the outbreak of the civil war.

200. ACTON (Baron), *The American Civil War* (one of his earlier writings, printed in *Historical Essays and Studies*, ed. FIGGIS, J. N., and LAURENCE, R. V., Cambridge, 1907), briefly touches upon factors often neglected by other writers, but the best survey for the purpose required here, remains
201. DUNNING, W. A., *Essays on the Civil War and Reconstruction, and Related Topics* (New York, 1898), though the more recent general works of
202. COLE, A. C., *The Irrepressible Conflict, 1850-1865* (New York, 1934), and
203. RANDALL, J. G., *The Civil War and Reconstruction* (New York, 1937), both by specialists in their field, sum up new viewpoints.

Some knowledge of the opinions of contemporary Americans is essential for the understanding of this crisis of federalism, and

204. CALHOUN, J. C., *A Disquisition on Government* (Vol. I. of *Works*, ed. CRALLÉ, F., 6 vols., New York, 1933-35),
205. STEPHENS, A. H., *A Constitutional View of the Late War between the States* (Philadelphia, 1867),
206. MOTLEY, J. L., *Correspondence* (ed. CURTIS, G. W., 2 vols., New York, 1889), and *J. L. Motley and His Family: Further Letters and Records* (ed. by his daughter, 1910), especially his letters to Bismarck, have here been found extremely valuable. (The quotation on p. 226 is from an unpublished letter from Motley to Francis Lieber, dated June 12, 1866,

preserved in Lieber's MS. Correspondence, in the Huntington Library, San Marino, California, and transcribed therefrom by the present writer with the permission of the Director of Research at the Library. The Lieber Correspondence, if and when published, would, in the opinion of the writer, rank in importance for constitutional issues, with these other contemporary works mentioned. Lieber was an Americanized German who lived both in the North and in the South.

For further bibliographical information see the relevant volumes of

207. *The American Nation* (28 vols., ed. HART, A. B., New York, 1904-18), still the best co-operative history, and also
208. *Guide to the Study and Reading of American History* (ed. CHANNING, HART and TURNER, New York, 1912). For recent titles see the bibliographies of DARESTE (2), COLE (202) and RANDALL (203) and
209. *Harvard Reading List in American History* (Cambridge, Mass., 1938), which is brief and select.

#### CHAPTER XVIII. A FEDERATED GERMAN EMPIRE

ALTMANN (8 — 1st edn., Vol. II), prints a comprehensive collection of the major Prussian constitutional documents issued between 1807 and 1891, as well as those of the North German Confederation, and the Empire of 1871 up to 1898 (7 — Vol. II). DARESTE (2 — first three editions) has the imperial constitution of 1871 in French, and DODD (11), WRIGHT (12), NEWTON (16) and *British and Foreign State Papers* (145) in English.

In addition to HARTUNG (154 — quoted pp. 238 and 239) DENIS (155 — only going up to the year 1852), WARD (156 — Vol. II), MEINECKE (157), ROBERTSON (158), MARCKS (159), SCHNABEL (160) and VALENTIN (193 — confined to the years 1848-50), there are other works of

210. MEINECKE, F., *Preussen und Deutschland* (Munich, 1918), a collection of published lectures and articles, and
211. MARCKS, E., *Bismarck* (only Vol. I, 1815-48, published), that throw much light upon the nucleation of a German empire around Prussia, and the background of this process, but the classic treatment by
212. SYBEL, H. VON, *Die Begründung des deutschen Reiches durch Wilhelm I* (Munich, 1889-94. Popular edn., 7 vols., Munich and Berlin, 1901-8. English trans. by PERRIN, M. L., and BRADFORD, G., New York and London, 1890-1901), remains most valuable, especially for the period up to 1866. Written from a liberal Austrian point of view,

213. FRIEDJUNG, H., *Der Kampf um die Vorherrschaft in Deutschland 1859 bis 1866* (Stuttgart and Berlin, 2 vols., 1897. Many subsequent edns. English trans. by TAYLOR, A. J. P. and McELWEE, W. L., complete apart from certain passages of military history, London, 1935) provides an excellent counterpart to Sybel for those crucial years.
- The vexed question of the inspiration of the constitution of 1867 is discussed by
214. TRIEPEL, H., *Zur Vorgeschichte der Norddeutschen Bundesverfassung* (in *Festschrift Otto Gierke zum Siebzigsten Geburtstag*, Weimar, 1911); the orthodox interpretation of the governmental aims of the Hohenzollern-Bismarckian empire at its zenith is to be found in TREITSCHKE's *Die Politik* (23); a penetrating foreign commentary upon its political institutions at their penultimate stage is that of
215. BARTHÉLEMY, J., *Les institutions politiques de l'Allemagne contemporaine* (Paris, 1915); while
216. MAXIMILIAN (Prinz von Baden), *Erinnerungen und Dokumente* (2 vols., 1927. English trans., as *Memoirs*, by CALDER, W. M., and SUTTON, C. W. H., 2 vols., London, 1928) traces its death agonies in the course of the *apologia* of its last Imperial Chancellor. Despite their general importance, the writings of the first Imperial Chancellor are somewhat elusive for constitutional issues. Nevertheless,
217. BISMARCK (Prinz OTTO von), *Gedanken und Erinnerungen* (2 vols., Stuttgart, 1898. English trans., London, 1898. *Anhang*, 2 vols., Stuttgart, 1901. Both many times reprinted in German editions) gives what he wanted the world to accept as his part in the constitutional history of Prussia and Germany, and this in itself is significant.

For further bibliographical information on Prussia and the Hohenzollern-Bismarckian empire, see the exhaustive classified bibliography known as

218. DAHLMANN-WAITZ, *Quellenkunde der deutschen Geschichte* (9th edn., ed. HAERING, H., Leipzig, 1931).

## CHAPTER XIX. HAPSBURG SYNTHESIS AND DISSOLUTION

Constitutional texts to be found in the general collections of ALTMANN (6 and 7), DARESTE (2 — first three editions) and DODD (11) comprise only a fragmentary selection of the constitutional documents of the Hapsburg Empire between 1848 and 1918, and need to be supplemented from special collections, such as



219. BERNATZIK, E., *Die österreichischen Verfassungsgesetze* (Leipzig, 1906) for Austria, and
220. RADO-ROTHFELD, S., *Die ungarische Verfassung, geschichtlich dargestellt* (Berlin, 1898. French trans. of the commentary but not of the texts, by BERTHA, A. DE, Paris, 1898) for Hungary. DARESTE (2 — 4th edn.) has a useful list of the principal constitutional laws of Hungary from earliest times to 1928 (extracts from some of which are given) and a valuable bibliography for Hungary (Vol. II, pp. 7-67). MIRKINE-GUETZÉVITCH (9) prints and comments upon Hungarian constitutional laws issued since 1922.

The best broad survey of the decay of Hapsburg governmental institutions during the last hundred years is

221. JÁSZI, O., *Dissolution of the Hapsburg Monarchy* (Chicago, 1929 — quoted pp. 250, and 261 three times). Jászi played a prominent part in Hungarian politics immediately after 1918, and his *Revolution and Counter-Revolution in Hungary* (London, 1924), though a less objective study, is also useful. The monumental but unfinished work of
222. REDLICH, J., *Das österreichische Staats- und Reichsproblem* (2 vols., Leipzig, 1920-26 — quoted twice p. 254), was used extensively for the purposes of this chapter and is encyclopaedic both in its exposition and in its bibliography. Originally planned to cover the period 1848-1918, it only reaches 1867. Important constitutional documents are printed on p. 214 ff. of Part II of Vol. I.
223. FRIEDJUNG, H., *Österreich von 1848 bis 1860* (Vol. I, Stuttgart and Berlin, 1909. Vol. II, first part, 1912. No more published) is another incomplete work of major importance, though its treatment is more general. The biography by
224. REDLICH, J., *The Emperor Francis Joseph of Austria* (London, 1929) contains valuable commentary on constitutional matters, while the introduction by R. W. Seton-Watson — quoted p. 254 — to
225. TSCHUPPIK, C., *The Reign of the Emperor Francis Joseph* (trans. by SPRIGGE, C. J. S., London, 1930), though brief, is very illuminating. Two other useful *ex post facto* surveys of the Hapsburg decline and fall are
226. BIBL, V., *Der Zerfall Österreichs* (2 vols., Vienna, 1922) and
227. BAUER, O., *Die österreichische Revolution* (Vienna, 1923. English trans. by STENNING, H. J., London, 1925 — quoted p. 262).

The *Ausgleich* of 1867 is analysed in detail by

228. EISENMANN, L., *Le compromis austro-hongrois de 1867* (Paris, 1904) and his *La Hongrie contemporaine* (Paris, 1920) traces

Hungary's fortunes under the system of the dual monarchy from 1867 to 1918.

229. SETON-WATSON, R. W., *Corruption and Reform in Hungary* (London, 1911) was severely critical of Magyar governmental practices.

The constitution of 1920 of the Austrian republic is printed in DARESTE (2 — 4th edn.), MIRKINE-GUETZÉVITCH (9), MCBAIN and ROGERS (13) and *Select Constitutions* (14), the first two of these incorporating the revision of 1929. The German text of the original constitution, with extensive authoritative commentary, is in

230. Kelsen, H., *Die Verfassungsgesetze der Republik Österreich* (Vienna, 1919-22). For the constitution of 1934 see  
230A. MERKL, A., *Die ständisch-autoritäre Verfassung Österreichs* (Vienna, 1935).

(*The Bibliography to Chapter XXIV contains further material concerning Hungary since 1918.*)

## PART VII

### CHAPTER XX. SECOND AND THIRD REPUBLICS IN FRANCE

DUGUIT and MONNIER (75) remains the most complete and convenient collection of French constitutional texts. The constitutional laws of the Third Republic are printed in most of the general collections, but the constitution of the Second Republic is more rarely found. In addition to Duguit and Monnier, ALTMANN (6), ANDERSON (76) and *B. and F. State Papers* (145) print it, in German, English and French respectively.

The Second Republic is treated somewhat briefly in many modern French histories, such as BOURGEOIS (163) and the volume by SEIGNOBOS in the *Histoire contemporaine* (162), but on a grander scale in the earlier work of

231. LA GORCE, P. DE, *Histoire de la seconde République française* (2 vols., Paris, 1897). An interesting enquiry into the inspiration for the constitution of 1848 is found in  
232. CURTIS, H. N., *American Constitutional Doctrine and the French Assembly of 1848* (Columbia University Series, New York, 1918).

The Commune of 1871 has produced an extensive literature. Recently it has been exhaustively dealt with and elaborately documented by

233. FABRE, M. A., *Les Drame de la Commune, 18 mars-27 mai 1871* (Paris, 1937). A somewhat chaotic study of it in English is
234. JELLINEK, F., *The Paris Commune of 1871* (London, 1937), with a useful bibliography of earlier works. To be compared with
- 234A. MASON, E. S., *The Paris Commune* (New York, 1930). The works of Marx and Lenin referred to on p. 275 are, in particular,
- 234B. MARX, C., *The Civil War in France* (London, 1871. Many times reprinted. German edn. with commentary by ENGELS, F., Berlin, 1891),
- 234C. LENIN, N. (ULYANOV, V. I.), *The Paris Commune* (London, 1933) and *State and Revolution* (London, 1933. Original Russian publication, Petrograd, 1917).

Most of the modern commentaries mentioned in the *General Bibliography* (pp. 475-478) deal in some measure with the government of the Third Republic. The works numbered 25, 26, 28, 29, 30, 32, 41, 42, 46 and 52 give detailed treatment. A *Journal of Modern History* bibliographical article by WINNACKER, R. A., covers *The Third French Republic, 1870-1914* in Vol. X, No. 3, Sept. 1938. Some of the more recent works that deal exclusively with France are :

235. BODLEY, J. E. C., *France* (2 vols., London, 1898. 2nd edn., 1902. French trans., 1904),
236. POINCARÉ, R., *How France is Governed* (London, 1913),
237. SALT, E. M., *Government and Politics in France* (London and New York, 1921),
238. BARTHÉLEMY, J., *Le gouvernement de la France* (Paris, revised edn., 1925. Eng. trans. by MORRIS, B., 1924),
239. BARTHÉLEMY, J., and DUEZ, P., *Traité élémentaire de droit constitutionnel* (Paris, 1926),
240. MIDDLETON, W. L., *The French Political System* (London, 1932),
241. VAUCHER, P., *Post-War France* (London, 1934) and
242. WERTH, A., *The Destiny of France* (London, 1937).

## CHAPTER XXI. A CENTURY OF REFORM IN BRITAIN

*The treatment of a hundred years of British institutional development in this chapter was deliberately summary and based almost exclusively upon the conclusions of secondary works. It could not otherwise have been kept to the scale of the rest of this work, because the writer is at present engaged upon*

a comprehensive examination (as far as such a task is possible) of the printed materials available for the development of the British constitutional system since the beginning of the nineteenth century, and these investigations have not yet proceeded far enough for any extensive crystallization of his own independent conclusions to be prudent, or indeed possible.

The admirable bibliographies supplied in the volumes of the new *Oxford History of England* (ed. CLARK, G. N. In progress) render the giving of any extensive list, which could only repeat these in an inadequate form, entirely superfluous. The volume by

243. WOODWARD, E. L., *The Age of Reform, 1815-70* (Oxford, 1938) unfortunately appeared too late to be made any use of, but the sections of its bibliography dealing with "Parliamentary Debates and Papers" (pp. 609-611) and with "Political and Constitutional History" (pp. 613-619) will be found specially valuable. That by
244. ENSOR, R. C. K., *England, 1870-1914* (Oxford, 1936) is a masterly survey in which institutional developments are treated as an integral part of the story of the period and not examined in isolation. The "Legal and Constitutional" section of his bibliography, and its "General" introduction, though inevitably more tentative than Woodward's corresponding sections, are most useful for the purpose required here. KEIR (182), also published too late to be used, has valuable footnote references to sources, secondary works and articles, but no bibliography. A recent work that attempts a survey of the last hundred years of the British constitution is
245. SMELLIE, K. B., *A Hundred Years of English Government* (London, 1937), and for administrative history it is most illuminating.
246. JENNINGS, W. A., *Cabinet Government* (London, 1936) examines the cabinet system both close-up and in perspective as it has developed to the present day.

Of earlier works, the examination of the British constitution at the end of the eighteen sixties by

247. BAGEHOT, W., *The English Constitution* (London, 1867. Revised 1872, and many times reprinted in various editions — quoted p. 296), in the middle eighties by
248. MAITLAND, F. W., *Constitutional History of England, Part V, "Sketch of Public Law at the Present Day (1887-88)"* (Cambridge, 1908. Many times reprinted), at the beginning of the twentieth century by

249. LOW, S., *The Governance of England* (London, 1904) and at the end of the nineteen-twenties by
250. MUIR, R., *How Britain is Governed* (London, 1930), together constitute a series of dissolving views, if not quite a moving picture, of the changing and unchanging features of the constitution as they appeared to acute contemporary observers. British institutions were analysed from an unusual angle by
251. GAUS, J. M., *Great Britain. A Study of Civic Loyalty* (Chicago, 1929) with refreshing results. Renewed and timely interest in DICEY (170 and 174) was aroused at about the same time by
252. HEWART (Baron), *The New Despotism* (London, 1929), a latter-day cry that the constitution was in danger.
253. LASKI, H. J., *Parliamentary Government in England* (London, 1938) sees danger from a different quarter.
254. MANSERGH, N., *The Government of Northern Ireland* (London, 1936) gives an astringent view and has a good bibliography.

## CHAPTER XXII. LIBERTARIAN INSTITUTIONS IN TRANSLATION

French and German colonial government are dealt with at length and with excellent bibliographies by

255. ROBERTS, S. H., *A History of French Colonial Policy, 1870-1925* (2 vols., London, 1929) and by
256. TOWNSEND, M. E., *Rise and Fall of Germany's Colonial Empire* (London, 1930) respectively. For bibliographical information concerning the government of the colonies of Holland, Belgium and Portugal, see the *Statesman's Year-book* (53).

The *Bibliography* to Chapter XXV deals with British colonial and Commonwealth government, apart from India. For India there is

257. KEITH, A. B., *Constitutional History of India* (London, 1936). His *Speeches and Documents on Indian Policy, 1750-1921*, is a selection of materials for the periods before the latest reforms. The descriptive commentary of
258. ILBERT, C. P., *The Government of India* (Oxford, 1922), and the more general work of
259. CHIROL, V., *India* (Modern World Series, London, 1926), also stop short of latest developments. For these the official publications :
260. *Report of the Indian Statutory Commission* ("The Simon Commission", Cmd. 3479, 2 vols., London and Calcutta, 1930 — quoted pp. 304-305), and

261. *Proceedings of the India Round Table Conference, 1930-1931* (London and Calcutta, 1931), combined with the relevant debates in Parliament at Westminster and the text of the resultant Government of India Act of 1935, are most important of all. Of the many special commentaries from different points of view, the following :
  262. MESTON (Baron), *India and the Simon Report* (London, 1930),
  263. ANDREWS, C. F., *India and the Simon Report* (New York and London, 1930),
  264. EDDY, J. P., and LAWTON, F. H., *India's New Constitution* (London, 1935),
  265. JOSHI, G. N., *The New Constitution of India* (London, 1937), may be mentioned. The Indian nationalist movement and its attitude toward the government of India is the subject of a recent survey,
  266. ANDREWS, C. F., and MUKERJI, G., *The Rise and Growth of the Congress* (London, 1938), published too late to be made use of here. It breaks off at the year 1921.
- A really satisfactory survey of the whole field of the United States' government of her dependencies has not been as yet produced, but the enormous amount of piecemeal material has been listed in the monumental
  267. BEMIS, S. F., and GRIFFIN, G. G., *Guide to the Diplomatic History of the United States* (Washington, 1935). The period 1899-1910 is covered (apart from recent works) in the *Guide* of CHANNING, HART and TURNER (208 — p. 551 ff.), while useful lists containing new as well as earlier works are given in the *Statesman's Yearbook* (53) at the ends of the sections dealing with the various dependencies. A recent work describing the foundation of the Island empire is
    268. PRATT, J. W., *Expansionists of 1898: The Acquisition of Hawaii and the Spanish Islands* (Baltimore, 1936, and London, 1937), and an enthusiastic anticipation of the passage and prospects of the Tydings-McDuffie Act, with useful documentary material, is that of
      269. OSIAS, C., and BARADI, M., *The Philippine Charter of Liberty* (Washington, 1933 — quoted p. 308). *Ex post facto* and more sober in tone is
        270. MALCOLM, G. A., *The Commonwealth of the Philippines* (2 vols., New York and London, 1936).

For the Pacific countries generally the excellent

271. *Problems of the Pacific* (Pacific Relations Conference Reports, Honolulu, 1933 and Oxford, 1937) are useful for problems of government. These problems also receive some attention from

272. HUDSON, G. F., *The Far East in World Politics* (London, 1937).

The Japanese constitution of 1889 is printed by DODD (11) and DARESTE (2), while MATSUNAMI's *Constitution of Japan* (183 — quoted pp. 309-310) has it in English, French, German and Japanese, as well as an interesting if somewhat bland commentary. With this should be compared a comprehensive American study,

273. QUIGLEY, H. S., *Japanese Government and Politics* (New York, 1932), with valuable bibliography. More general works are
274. NITOE, I., *Japan* (Modern World Series, London, 1934) and, on a smaller scale,
275. JONES, F. C., *Japan* (London, 1933). For earlier developments

276. PORTER, R. P., *Japan. The Rise of a Modern Power* (Oxford, 1918), remains one of the best short works in English.

For guidance concerning the complicated constitutional history of republican China, and for its documentation,

277. WU, C. F., *Chinese Government and Politics* (New York, 1934), is most satisfactory. The ideas on government of SUN WEN are in his
278. *The Three Principles of the People* (English version, Shanghai, 1927 — quoted p. 315), his career is described by himself in *Memoirs of a Chinese Revolutionary* (London, 1928, with useful appendices) and his political testament is printed by
279. WHYTE, A. F., *China and Foreign Powers* (London, 1928) together with the Kuomintang programme. DARESTE (2 — 4th edn.) also prints these, the provisional constitution of 1931, and other documents of the period 1925-31. A good general study of modern China in historical perspective is
280. LYALL, L. A., *China* (Modern World Series, 1934), a special study of cultural contacts is made by
281. HUDSON, G. F., *Europe and China: A Survey of their Relations . . . to 1800* (London, 1931), while a most illuminating commentary on the spirit of old and new China can be found in
282. HU, S., *The Chinese Renaissance* (London, 1934).

## PART VIII

### CHAPTER XXIII. THE SUCCESSION STATES

All except the most recent constitutions of the European succession states are to be found scattered through the col-

lections of DARESTE (2 — 4th edn.), MIRKINE-GUETZÉVITCH (9), McBAIN and ROGERS (13), *Select Constitutions* (14), as indicated in detail in the *General Bibliography* under these numbers, and GRAHAM (15) prints many supplementary documents of constitutional importance.

Of the general commentaries BRYCE (32) is primarily concerned with the older democracies, but has incidental references to the new post-war democracies in so far as they had developed as such by the end of the year 1920, but BURDEAU (35), HEADLAM-MORLEY (40), FINER (42), LAVERGNE (43), ZURCHER (44 — quoted p. 322) and BUELL (45 — the Baltic States are dealt with in the 1st edn. only) all consider them in detail. Zurcher's is perhaps the most satisfactory single-volume treatment in English of the succession states as a group, but is already to a certain extent out of date in its original and as yet unrevised edition of 1933. From a special angle (see also GIRAUD — 52A)

283. BARTHÉLEMY, J., *La crise de la démocratie contemporaine* (Paris, 1931), surveys libertarian institutions in decay in states old and new, while two works of
284. MACARTNEY, W. C., *National States and National Minorities* (Oxford, 1934) and *Hungary and her Successors* (Oxford, 1937), help to explain the difficulties confronting any form of government in the succession states, and particularly in Poland, Czechoslovakia and Yugoslavia. A picture of conditions in the various component parts of the succession states on the eve of the organization of their post-war governmental forms is given in the detailed
285. *Peace Handbooks* (ed. PROTHERO, G., 25 vols., H.M. Stationery Office, London, 1919-20 — Vols. I-II, "Austria-Hungary"; Vols. III-IV, "The Balkan States"; Vol. VIII, "Poland and Finland"; Vol. IX, "The Russian Empire").

A thorough study of the governmental system of Yugoslavia under the constitution of 1921 was made in

286. BEARD, C. A., and RADIN, G., *The Balkan Pivot: Yugoslavia. A Study in Government and Administration* (New York, 1929) on the eve of the abandonment of that system. The three Baltic states have been the subjects of a recent brief survey, which includes their latest constitutional development,
287. *The Baltic States* (Information Dept. of the Royal Institute of International Affairs, Oxford, 1938).

The study by

288. DYBOSKI, R., *Poland* (Modern World Series, London, 1933 — quoted p. 337) is, in places, almost startlingly objective in its treatment of matters of government and politics. The



Polish constitution of 1921 is available in the principal collections, but the "little constitution" of 1919 and the constitution of 1935 are not. The former appears in a French translation in

289. CIECHANOV, R., *La présidence de la république d'après les lois de la Pologne contemporaine* (Paris, 1926 — quoted p. 336), which is a useful study in itself, and an English version of the latter,
290. *The Constitution of the Republic of Poland* (Warsaw, 1935), has been published by the Polish Commission for International Law Co-operation, with "An Outline of Legislation, on Presidential and Parliamentary Elections" by POTULICKI, M., as appendix. A French translation of Pilsudski's *Gazeta Polska* interview — quoted p. 339 — appeared in the *Annuaire Interparlementaire* for the year 1931. The quotation on p. 340 is from the London *Times* of October 14, 1935.

Czechoslovakia has been the subject of an enormous literature dealing with or touching upon matters of government, and much of this is already very much out of date. A good general history is that of

291. KROFTA, C., *History of Czechoslovakia* (London, 1935. German version, Berlin, 1932, and French, Paris, 1934), while
292. MASARYK, T. G., *Czechoslovakia: The Making of a State* (London, 1929), is of course of permanent value. Perhaps the best of many very recent works on Czechoslovakia available in English is
293. WISKEMANN, E., *Czechs and Germans* (Oxford, 1938). When the story of the partition of Czechoslovakia of 1938 and of the reconstitution of the rump of her territories as a federal state comes to be told, the British White Paper, *Correspondence respecting Czechoslovakia, September 1938* (Cmd. 5847, H.M. Stationery Office, London, 1938) containing, in particular, the letter of Viscount Runciman to the Prime Minister, dated September 21, 1938, will remain among the materials of basic importance for such a survey. *Further Documents — including the Agreement concluded at Munich on September 29th, 1938* (Cmd. 5848, H.M. Stationery Office, London, 1938) also contains significant material.

#### CHAPTER XXIV. REINCARNATION OF EXISTING STATES

DARESTE (2 — 4th edn.) and MIRKINE-GUETZEVITCH (9) have the relevant constitutions in French. WRIGHT (12) has the Bulgarian, incorporating the changes of 1911, though

not post-war amendments, in English. The German Weimar constitution is printed in most general post-war collections, and McBAIN and ROGERS (13), *Select Constitutions* (14) and NEWTON (16) have it in English. The German text here used was that issued in pamphlet form to be presented to every German child upon leaving school :

294. *Die Verfassung des deutschen Reichs vom 11. August 1919. Den Schülern und Schülerinnen zur Schulentlassung* (N.D.), with brief introduction and a useful index to the details of the text.

A good general treatment of modern Hungary is that of

295. MACARTNEY, W. C., *Hungary* (Modern World Series, London, 1934), and an account of her post-war partitioning is to be found in his *Hungary and Her Successors* (284).

(For the constitutions of post-war Austria and Hungary see the Bibliography to Chapter XIX. For Yugoslavia see that to Chapter XXIII for the period before 1929 and that to Chapter XXVII after that date.)

The general commentaries are inclined to be meagre in their attentions to Rumania, Bulgaria and Turkey, and special works must be consulted for adequate treatment. For Rumania there exist in English

296. RIKER, T. W., *The Making of Rumania* (New York and London, 1934) and
297. CLARK, J., *Politics and Political Parties in Rumania* (London, 1936), but for political institutions
298. SCHMIDT, E., *Die verfassungsrechtliche und politische Struktur des Rumänischen Staates in ihrer historischen Entwicklung* (Munich, 1932) is more detailed. A general study of Bulgaria is
299. DESBONS, G., *La Bulgarie après le traité de Neuilly* (Paris, 1930), but her government as it was during the early post-war years is described more fully by
300. ZLATANOFF, E., *La Constitution bulgare et ses principes* (Paris, 1926). In English there is a general account of developments in all three countries in
301. MILLER, W., *The Ottoman Empire and its Successors, 1801-1927* (4th edn., with an appendix covering the years 1927-36, Cambridge, 1936). The new Turkey is the subject of an admirable recent monograph,
302. LUKE, H., *The Making of Modern Turkey* (London, 1936 — quoted p. 348), particularly good on institutional reforms, and there are also
303. JARMAN, T. L., *Turkey* (Modern States Series, London, 1935) and

304. TOYNBEE, A. J., and KIRKWOOD, K. P., *Turkey* (Modern World Series, 1926), the former a brief account and the latter needing to be brought up to date.

Republican Germany of the Weimar constitution, on the other hand, bulks large in the general commentaries. HEADLAM-MORLEY (40 — quoted pp. 352-353) devotes a great deal of attention to Germany and gives a select bibliography for the Weimar constitution, and GRAHAM (15) in his *Central Europe* prints and discusses important subsidiary documents, but LOWELL (30), BURDEAU (35), RAY (41), FINER (42 — *Foreign Governments*, quoted p. 352), LAVERGNE (43), ZURCHER (44 — with valuable bibliography, including articles), BUELL (45 — for the breakdown of the Weimar system) and BORNHAK (49 — a hostile *post-mortem* account, quoted p. 365) all give the subject special attention, while WITMAN (50) charts the Weimar government. A detailed bibliography of earlier works on the Weimar constitution is that of

305. EMERSON, R. E., *The German Constitution : A Bibliography* (in *Economica*, Vol. VI, pp. 157-199, London, 1926). The same writer's *State and Sovereignty in Modern Germany* (London, 1928) is useful for the development of political and juridical ideas in Germany both before and during the Weimar period. Other useful works are the general accounts of
306. GOOCH, G. P., *Germany* (Modern World Series, London, 1925),
307. KOSOK, P., *Modern Germany* (Making of Citizens Series, Chicago, 1933),
308. ROSENBERG, ARTHUR, *Birth of the German Republic, 1871-1918* (trans. by MORROW, I. F. D., London, 1931, from original German work, *Die Entstehung der deutschen Republik*, Berlin, 1928 — 2nd edn., 1930) and
309. ROSENBERG, ARTHUR, *History of the German Republic* (trans. MORROW and SIEVEKING, London, 1936), bringing the story up to the spring of 1935, though in detail only to 1930, and containing valuable chapter bibliographies and extracts from unprinted material, such as the minutes of the Council of People's Representatives of November and December, 1918. Of the detailed constitutional commentaries, that of
310. ANSCHÜTZ, G., *Die Verfassung des deutschen Reiches vom 11. August, 1919* (Berlin, 1921. 14th edn., Berlin, 1933), has deservedly acquired a high reputation.
311. PREUSS, H., *Um die Reichsverfassung von Weimar* (Berlin, 1924) is interesting because of the author's intimate connection with the drafting of the constitution of 1919. For Preuss, see also GRAHAM, *Central Europe* (15 — pp. 454-467).

HARTUNG (154) includes the founding of the Weimar republic in the third edition of his *Verfassungsgeschichte*. The implications of article 165 of the Weimar constitution and the Economic Council idea are discussed in

312. FINER, H., *Representative Government and a Parliament of Industry* (London, 1923)

(For the German Third Reich, see the Bibliography to Chapter XXVII.)

#### CHAPTER XXV. "NATIONS YET TO BE"

The texts of the various constitutions of the British Commonwealth of nations may be found scattered through the general collections (2, 9, 11, 12, 14 and 16), DARESTE (2) and NEWTON (16) also printing a number of documents of importance in the development of the status and relations of the Commonwealth's members, but the most convenient, complete and up-to-date collection of texts of all current Commonwealth constitutions is

313. *Constitutions of All Countries. Vol. I: The British Empire* (H.M. Stationery Office, Foreign Office Publication, London, 1938). This collection appeared too late, unfortunately, to be used here, but it is most comprehensive, including India, the Newfoundland Act of 1933 and constitutional documents relevant to the Colonial empire. Volume II is to deal with European countries and their dependencies, and should be equally valuable when it is published.

No attempt can be made here to list works on the separate Commonwealth nations, for which the notes and bibliographies of the books here mentioned, and the very full bibliographies to the appropriate sections of DARESTE (2) and the *Statesman's Yearbook* (53) can be consulted, as well as

314. CRAVEN, W. F., *Historical Study of the British Empire*, a bibliographical article in the *Journal of Modern History* (Vol. VI, No. 1, March 1934, pp. 40-69).

As a general survey in the light of new developments

315. ZIMMERN, A. E., *The Third British Empire* (Oxford, 1926), still remains valuable, as do also the various
316. *Harris Foundation Lectures — Great Britain and the Dominions* (Chicago, 1927) by a number of experts. A recent co-operative work,
317. *The British Empire* (A Report on its Structure and Problems by a Study Group of the Royal Institute of International Affairs, 2nd edn., revised and enlarged, Oxford, 1938), deals briefly in turn with the countries of the Empire, the fabric of the Empire and imperial problems with great skill and high

impartiality. Less impersonal are the warm-hearted and selective "series of exact factual studies, joined to each other by the unity of an idea" of

318. HANCOCK, W. K., *Survey of British Commonwealth Affairs. Vol. I — Problems of Nationality, 1918-1936* (Oxford, 1937, with a supplementary chapter by LATHAM, R. T. E., on "The Law and the Commonwealth" — quoted p. 370). Vol. II is to deal with Economic and Commercial problems and the cold-blooded and encyclopaedic setting forth of the "status of the Dominions . . . with a certain measure of assurance" of
319. KEITH, A. B., *The Dominions as Sovereign States* (London, 1938). Of the same author's numerous other works in the same field, *The Governments of the British Empire* (London, 1935), a detailed survey, and *Speeches and Documents on the British Empire, 1918-31* (Oxford, 1932), containing valuable extracts from imperial conference proceedings and from debates in the various Commonwealth parliaments, with full references, should also be specially mentioned.

(For further material concerning India see the Bibliography to Chapter XXII.)

## PART IX

### CHAPTER XXVI. THE RUSSIAN ALTERNATIVE

Both DARESTE (2 — 4th edn.) and MIRKINE-GUETZÉVITCH (9 — 2nd edn.) have the texts in French of the constitutions of the U.S.S.R. and the R.S.F.S.R., as amended up to 1930. MCBAIN and ROGERS (13) and *Select Constitutions* (14) have English versions of the original R.S.F.S.R. constitution of 1918, both with short introductory comments. A convenient English translation of the U.S.S.R. and R.S.F.S.R. constitutions as amended up to 1932, is

320. *The Fundamental Law (Constitution) of the U.S.S.R. Together with the Constitution (Fundamental Law) of the R.S.F.S.R.* (A pamphlet issued by the Co-operative Publishing Society of Foreign Workers in the U.S.S.R., Moscow, 1932.) A number of English translations of the U.S.S.R. constitution of 1936 have already appeared, and these have been collated in
321. STRONG, A. L., *The New Soviet Constitution* (New York, 1937), who appends her own translation, making use of these others, to her commentary. Strong's version is reprinted in

322. WEBB, S. and B., *Soviet Communism — A New Civilization* (London, 1935. 2nd edn., 2 vols. in one, London, 1937, Vol. I, Appendix XII, along with her summary of differences between the U.S.S.R. constitutions of 1924 and 1936, and the Webbs' own summary of the latter constitution as "a new Declaration of the Rights of Man", and of the new electoral regulations). The Co-operative Publishing Society of Foreign Workers has issued a translation of the 1936 constitution in convenient pamphlet form (though Strong criticizes its "sovietized English"):
323. *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics . . . December 5, 1936* (Moscow, 1937).

The most substantial study in the English language of the Russian soviet system is that of WEBB, S. and B. (322 — quoted pp. 396 and 409), and it is likely to remain the standard treatise for a long time to come. Its general attitude is friendly, at times almost paternal. There is no formal bibliography, but a very large number of works are cited and described in the voluminous footnotes. Three separate indices assist considerably in the use of this work. Volume I deals specifically with "The Constitution", and in the 2nd edn., the U.S.S.R. constitution of 1936 is comprehended by the addition of a new Appendix (XII) to Vol. I, and by devoting part of the "Postscript" to Vol. II to it. Appendices I and II to Vol. I set out the political and administrative structure of the U.S.S.R. in diagrammatic form (the work of TURIN, S. P.) and these diagrams may be compared with those in WITMAN (50). The general commentaries often find Soviet Russia too large a subject for clear or adequate treatment, but KANTOROWICZ (4), with its excellent bibliography, and BUELL (45), both treating its government as a dictatorship, and MUNRO (52), a more non-committal treatment, are particularly useful within a brief compass. LASKI (37 and 48) is more enthusiastic where his works touch upon the soviet system. His attitude is well summed up in an interesting article which he contributed to *The Manchester Guardian* — quoted p. 410 — entitled "New Freedoms in Russia" on the occasion of the publication of the new draft constitution of the U.S.S.R. in 1935.

Special works upon Soviet Russia abound, but many are much out of date, and the majority are distinguished by more or less violent partizanship in one direction or another. The following are among those which rise superior to the general level of books on Soviet Russia designed for Western readers :

324. TURIN, S. P., *Peter the Great to Lenin. A History of the Russian Labour Movement.* (London, 1935). Valuable for background, and for the first soviets in particular.
325. ROSENBERG, ARTHUR. *History of Bolshevism . . . from Marx to the First Five Year Plan* (trans. from the German, Berlin, 1932, by MORROW, I. F. D., London, 1934). Sympathetic but not uncritical, and with a good select bibliography.
326. BRAILSFORD, H. N., *The Russian Workers' Republic* (New York, 1920) and *How the Soviets Work* (New York, 1927). Brief descriptions by a master of popularization that have yet to be surpassed.
327. BATSELL, W. R., *Soviet Rule in Russia* (New York, 1929). Heavily documented, and described by the Webbs as "of lasting usefulness".
328. HARPER, S. N., *Civic Training in Soviet Russia* (Chicago, 1929) and *Making Bolsheviks* (Chicago, 1931). Excellent, but overlapping.
329. MAXWELL, B. W., *The Soviet State* (New York, 1934). Particularly useful for local government and details of administration.
330. MIRKINE-GUETZÉVITCH, B., *La Théorie générale de l'état Soviétique* (Paris, 1928), with documentary appendices, including the texts, in French, of the U.S.S.R. and R.S.F.S.R. constitutions.

The above-mentioned works comment upon and frequently quote the writings of the founders of the soviet system in Russia, but in addition to *State and Revolution* (234c).

331. LENIN, N. (ULYANOV, V. I.), *The Deception of the People by the Slogans of Equality and Freedom* (speech delivered in 1919. English trans., London, 1935) and *The State* (lecture delivered in 1919. English trans., London, 1934) were found illuminating as brief summaries of his point of view, while
332. STALIN (DZHUGAHSVILI, J. V.), *Marxism and the National and Colonial Question* (trans. Moscow and London, 1935-36), a collection of scattered writings on this theme, some stretching back to before the Revolution, has paramount importance for the student of the ideological bases of the U.S.S.R. federation. With it should be compared the monograph by MACARTNEY, W. C., *National States and National Minorities* (284), the best objective study.
333. TROTSKY, L. (BRONSTEIN, P.), *My Life* (London and New York, 1930) exposes from his point of view the ideological and tactical clash of the Trotskyists and Stalinists over the bones of the Leninist dogma. From the man in possession there is the massive

334. STALIN (DZUGAHSVILI, J. V.), *Leninism* (trans. 2 vols., London, 1934). In lighter vein is his interesting speech delivered on November 14, 1936, on the occasion of the presentation of the final draft of the new constitution of the U.S.S.R. to the Congress of Soviets, translated into English as
335. *The New Democracy — Stalin's Speech on the New Constitution* (London, 1937 — quoted pp. 400 and 401).

Two small works of special interest because of the antecedents of their authors, may perhaps be specially mentioned out of the welter of impressions and comparisons the Soviet system in Russia has inspired. These are

336. MATHIEZ, A., *Le Bolchévisme et le Jacobinisme* (Paris, 1920) and
337. PARES, B., *Moscow Admits a Critic* (London, 1936).

A translation into English is available of what are described as

338. *The Fundamental Laws of the Chinese Soviet Republic* (London, 1934, with an introduction by BELA KUN). First-hand accounts have been given by travellers in
339. FLEMING, P., *One's Company* (London, 1934) and, with the "Great Trek" intervening, in
340. SNOW, E., *Red Star Over China* (London, 1937). A work by
341. YAKHONTOFF, V. A., entitled *The Chinese Soviets* (New York, 1934), was not used here. The Webbs (322 — Vol. II, p. 1098, n.) give it a poor reputation.

No detailed study of the various republics and territories of the U.S.S.R. has here been made, nor have their separate constitutions been consulted, apart from that of the R.S.F.S.R. For the texts in Russian see the bibliography to DARESTE (2 — 4th edn., Vol. II, p. 387), and to

342. YANIEFF, S., *La Constitution de l'Union des Républiques Soviétiques* (Lyon, 1925).

## CHAPTER XXVII. THE ITALIAN ALTERNATIVE

Both DARESTE (2) — 4th edn., Vols. II and III) and MIRKINE-GUETZÉVITCH (9) print French translations of the principal Italian laws, decrees and other documents of constitutional importance issued between 1922 and 1930, but no comparable collections exist of those since that date, and except for isolated documents translated by various foreign commentators, the official Italian texts (see DARESTE, Vol. II, for detailed references to the *Gazzetta ufficiale* and for a very full bibliography of texts and commentaries) have to be used. The "Bibliography of Dictatorship", printed



in KANTOROWITZ (4 — quoted p. 418 i-ii) is more up to date for commentaries

Of the commentaries listed in the *General Bibliography* the following contain separate sections dealing with the government of fascist Italy in detail — RAY (41), BUELL (45 — revised in 2nd edn. to 1937), WITMAN (51 — for representation in diagrammatic form) and MUNRO (52 — revised to 1938). Piecemeal discussion of Italian fascist government in the course of comparative surveys is to be found in MIRKINE-GUETZÉVITCH (9 — *essai synthétique* preceding texts), FINER, *Theory and Practice* (42), FORD (47) and LASKI (48). The annual volumes of the *Statesman's Yearbook* (53) issued since 1922 give useful year-to-year outlines of the ever-changing fascist governmental system in Italy, and brief summaries of the most important laws and decrees.

Of the innumerable works on fascist Italy in many languages, no investigator can hope to consult more than a selection, nor to recommend all of these. The following works, representing a number of points of view, have all been found useful by the present writer :

343. SCHNEIDER, H. W., *Making the Fascist State* (New York, 1928). Encyclopaedic and dispassionate, with invaluable documentary appendix and exhaustive bibliography up to 1928.
344. SCHNEIDER, H. W., and CLOUGH, S. B., *Making Fascists* (Chicago, 1929). A partial rearrangement of Schneider's earlier work, but with new material on civic training in fascist Italy.
345. SPENCER, H. R., *Government and Politics in Italy* (New York, 1932 — quoted p. 415 ii). A valuable straightforward account with useful quotations. Critical without being in any way an attack upon fascism.
346. FINER, H., *Mussolini's Italy* (London, 1935 — quoted pp. 415 i, 418 iii 421 and 423). The best work yet on the subject in English, dispassionate up to a point, analysing Mussolini and fascism more in sorrow than in anger.
347. KING, B., *Fascism in Italy* (London, 1931), by the historian of Italian unity, is an avowedly anti-fascist *exposé*, historically planned, with useful appendices of documents (e.g. the Electoral Law of 1928, and extracts from the Charter of Labour). Fascism's greatest literary antagonist,
348. SALVEMINI, G., in *The Fascist Dictatorship in Italy* (London and New York, 1927), in *Under the Axe of Fascism* (London, 1936) and many lesser writings, can be compared with VILLARI, L., one of its leading publicists, in *Italy* (187), in

his earlier *The Fascist Experiment* (London, 1928 — now rather out of date) and in his other *apologia*.

For the political ideas of Italian fascism :

- 349. LION, A., *The Pedigree of Fascism* (London, 1927) is a starry-eyed attempt at a philosophical justification of Mussolini, who is compared to Dante. Useful on antecedents.
- 350. ROCCA, A., *The Political Doctrines of Fascism* (London, 1926) is an exposition by an early exponent of them.
- 351. BECKERATH, E. VON, *Wesen und Werden des fascistischen Staates* (Berlin, 1927) is an objective German study, and
- 352. BORNHAK, C., *Das italienische Staatsrecht des Fascismus* (Leipzig, 1934), though less objective, is too early to have an axis to grind. The economic side of Italian fascism is explained by
- 353. VOLPI, G., *Italy's Financial Policy* (London, 1927) as it had developed in its first five years, and a translation of the Charter of Labour is appended.
- 354. ROSENSTOCK-FRANCK, L., *L'Économie corporative fasciste en doctrine et en fait* (Paris, 1934) discusses promise and achievement and recent developments.
- 355. *The Economic and Financial Position of Italy* (Royal Institute of International Affairs, Information Department Papers, No. 15, London, 1935) contains an invaluable summary (Part I) of the corporative structure, with a useful diagrammatic representation (p. 6) that can be compared with WITMAN'S (50) and with BUELL'S (45 — 2nd edn., p. 103).

What the founder of Italian fascism wished the world to think of it when he wrote or inspired the article in the

- 356. *Encyclopedia Italiana* (Milan, 1929-32, Vol. XIV, pp. 847-84) on *Fascismo* (translated into English and issued in pamphlet form, London, 1933) can be read in that contribution. A Mussolini bibliography is of course beyond the scope or intentions of this work.

For the text of the curious constitution of Fiume, the ten Corporations of which ("the ten muses" of the constitution, the unnamed tenth corporation being "riservata alle forze misteriose del popolo") are alleged to be the inspiration for the corporative system of fascist Italy, see

- 357. D'ANNUNZIO, G., *La Reggenza Italiana del Carnaro. Disegno di un nuovo ordinamento dello Stato Libero di Fiume* (Biblioteka di Propaganda a cura dell'unione spiritual d'Annunziana, Serie A. Libro 1, Novara, 1925).

The impact and implications of fascism are brilliantly and mordantly discussed in the recent work of

358. LIPPMANN, W., *The Good Society* (New York and London, 1937). He is equally trenchant concerning the Russian alternative. An earlier and briefer summing up of these same alternatives was made by ALFRED WEBER (142) before fascism came to his own country. KANTOROWICZ (4), BARTHÉLEMY (283), BUELL (45 — especially the introductory chapter) and FORD (47) all deal with the wider implications of the contemporary dictatorial trend.

Contemporary Spain is still in the hands of the propagandists and the impressionists, but for Spain on the eve of the establishment of the republic of 1931 there is

359. MADARIAGO, S. DE, *Spain* (Modern World Series, London and New York, 1930), and on the eve of the rebellion of 1936, the *Enciclopedia Espasa* (98) and
360. PEERS, E. A., *The Spanish Tragedy* (London, 1936), supplemented later by his *Catalonia Infelix* (London, 1937). There is an excellent account of the "Directory" of Primo de Rivera and of the establishment of the republic, carried in the 2nd edn. up to the early phases of the civil war, in BUELL (45), while a good analysis of the constitution of 1931 is that of
361. GREAVES, H. R. G., *The Spanish Constitution* (Day to Day Pamphlets, No. 15, London, 1933). DARESTE (2 — 4th edn.) has the early decrees of the provisional government (Vol. III — the monarchical constitution of 1876 is in Vol. II), but not the republican constitution of 1931. An English translation of this constitution was published in the periodical *Current History* (New York) for June 1932.

LEGRAND (95) breaks off his history of Portugal at the establishment of the authoritarian régime of 1926, but

362. GUYOMAR, E., *La dictature militaire au Portugal* (Paris, 1927) describes the system in its early stages, while the developed *Estado Novo* is the subject of studies by
363. PEREIRA DOS SANTOS, J. P., *Un état corporatif. La constitution sociale et politique portugaise* (Paris, 1935) and by
364. COTTA, F., *Economic Planning in Corporative Portugal* (London, 1937). DARESTE (2 — 4th edn.) has the constitution of 1911 with modifications and decree laws of constitutional significance up to 1930, but not the constitution of the *Estado Novo*.

For a brief account of recent developments in Albania and Greece up to 1936, see the latest edition of MILLER (301). DARESTE (2 — 4th edn.) has the republican constitution of

- 1925 and the monarchical constitution of 1928 of Albania, as well as the Greek republican constitution of 1927 and of the law of 1929 revising the Senate, with useful commentaries and bibliographies. For Greece up to 1928 there is
365. MILLER, W., *Greece* (London, 1928), giving more detail than his *Ottoman Empire and its Successors* (301). The second volume of
366. *The Balkan States. I — Economic. A Review of the Economic and Financial Development of Albania, Greece, Bulgaria, Rumania and Jugoslavia* (Information Department of the Royal Institute of International Affairs, London, 1936) will, it is hoped, include a much-needed survey of political structure and recent governmental changes in the contemporary Balkans.

- DARESTE (2 — 4th edn.) has King Alexander's *ukase* of 1929 suspending the Yugoslav constitution of 1921, as well as that constitution itself (Vol. II) and his new constitution of 1931 (Vol. III). His emergency *régime* of 1929 is described in
367. YOVANOVITCH, M., *Larégime absolue Yougoslave* (Paris, 1930).

- Since the passing of the *Ermächtigungsgesetz* on March 24, 1933, the constitutional system of the German Reich has been fundamentally modified by a series of governmental decrees. The Weimar constitution as it stood on the eve of these changes is given by ANSCHÜTZ (310 — 14th edn.) and the decrees themselves can be found in the official *Reichsgesetzblatt*, or in more handy form, in a series of volumes of *Reclams Universal Bibliothek*, published very appropriately under the general title of *Die Hitlergesetze* (Leipzig, 1933 ff. In progress) at Rpf. 40 apiece. They are also to be found in
368. HOCHÉ, W. (ed.), *Die Gesetzgebung des Kabinetts Hitler : Die Gesetze in Reich und Preussen seit dem 30. Januar 1933* (Berlin, 1933 ff. In progress), and in a number of other unofficial German editions. The earlier decrees of the *régime* have been translated into English by
369. POLLOCK, J. K., and HENEMAN, H. J., *The Hitler Decrees* (Ann Arbor, Mich., 1934). Authorized summaries and commentaries upon the leading decrees have been published in the series
370. *Das Recht der Nationalen Revolution* (ed. KAISENBERG, G., and MEDICUS, F. A., Berlin, 1933 ff.), of which No. 1 (*Programm der Reichsregierung und Ermächtigungsgesetz*), No. 2 (*Gleichschaltung der Länder mit dem Reich*), No. 3 (*Das Reichstatthaltergesetz*) and No. 9 (*Der Neuaufbau des Reiches*)

*nach dem Reichsreformgesetz vom 30. Januar 1934*) have been used here. Another authorized series is

371. *Staat. Recht. Wirtschaft* (ed. WELS, P., Dresden, 1933 ff.), of which No. 1 (*Staat und Volk — Staatskunde des deutschen Einheitsstaates*, 4th edn., 1935) has been used.

BUELL (45) has a very good section on the Third Reich up to 1937 and MUNRO (52) covers it in detail as well, while WITMAN (50) charts its system of government. The following special works have been found useful here :

372. GREENWOOD, H. P., *The German Revolution* (London, 1934).  
 373. TILLMANN, A., *L'Organisation économique et sociale du III<sup>e</sup> Reich* (Paris, 1935), with an excellent bibliography.  
 374. MARX, F. M., *Government in the Third Reich* (New York, 1936).  
 375. MOWRER, E., *Germany Puts the Clock Back* (New York, 1932, London, 1933. Revised edn., London, 1937).  
 376. ROBERTS, S. H., *The House that Hitler Built* (London, 1937).  
 377. BRADY, *The Spirit and Structure of German Fascism* (London, 1937), less judicious than Roberts, but more thorough in places, and containing useful charts.  
 378. SCHUMANN, F. L., *Hitler and the Nazi Dictatorship* (New York, 1937).

Of the writings of the founders of the Third Reich,

379. HITLER, A., *Mein Kampf* (129-130 Auflage, 2 vols. in one, Munich, 1935, was the edition used here. The authorized English translation is bowdlerized to the extent of being quite worthless) is of course indispensable. (Quoted pp. 347 and 351.) Others of importance include  
 380. FEDER, G., *Das Programm der N.S.D.A.P. und seine weltanschaulichen Grundgedanken* (Munich, 1932. Many other editions),  
 381. FRICK, W., *Der Neuaufbau des Reiches* (Berlin, 1934),  
 382. GOEBBELS, J., *Vom Kaiserhof zur Reichskanzlei* (Munich, 1934),  
 383. GOERING, H., *Der Geist des neuen Staates* (Berlin, 1937) and  
 384. ROSENBERG, ALFRED, *Das Programm der Bewegung erweitert durch das Agrar-Programm* (new edn., Munich, 1934) and *Der Mythos des 20ten Jahrhunderts* (new edn., Munich, 1934).  
 385. *Das Nationalsozialistische Jahrbuch* (annual publication) is valuable and most revealing for the current structure and standpoint of the N.S.D.A.P.

## CHAPTER XXVIII. THE AMERICAN WAY

For texts see the *Bibliographies* to Chapters II and XVII. DARESTE (2 — 4th edn., Vol. VI, published 1934), though the texts are in French, is extremely useful for its extensive bibliography of works and articles on every detail of the

federal constitution, and for its topical analysis of all the state constitutions. With the latter can be compared an earlier attempt,

386. *New York State Constitution Convention Commission: Index Digest of State Constitutions* (New York, 1915). The contemporary state constitutions are beyond the scope of this work, but
387. HOLCOMB, A. N., *State Government in the United States* (New York, 1931) is a useful recent survey. Perhaps the Nebraska experiment in dispensing in 1937 (alone among the states) with a second chamber, deserves special attention. This has been discussed by
388. SENNING, J. P., *The One-House Legislature* (New York, 1937).  
       BRYCE (69 — revised edn.), BROGAN (70 — quoted p. 454 ii) and MCBAIN (71) remain useful for the government of the United States in its development up to the "New Deal" era. With them may be compared
389. CORWIN, E., *The Constitution and What it Means Today* (Princeton, 1924) and the two works of
390. MUNRO, W. B., *The Invisible Government* (New York, 1928) and *The Makers of the Unwritten Constitution* (New York, 1930). A more recent and challenging study is
391. ELLIOTT, W. F., *The Need for Constitutional Reform* (New York, 1935).

The New Deal in government itself has produced a large number of writings by those associated with it and those who object to some or all of its features. Of the former

392. TUGWELL, R. G., *The Battle for Democracy* (New York, 1935 — quoted p. 459), especially his first essay, entitled "Design for Government", is one of the most significant, while of the latter LIPPMANN, W., *The Good Society* (358 — quoted pp. 460 and 466) is by far the most thoughtful, and represents an attitude reached after much tentative approval of the New Deal in such writings as
393. LIPPMANN, W., *The New Imperative* (New York, 1935 — quoted p. 464). Even now it is the methods, not the ends of the "New Deal" to which he objects. Of the many efforts to link up the Roosevelt experiments with Jeffersonian Democracy, or to depict them as running counter to it,
394. WILTSE, C. M., *The Jeffersonian Tradition in American Democracy* (London and New York, 1937), a book possessing value beyond immediate controversies, attempts the first of these tasks, and
395. ADAMS, J. T., *The Living Jefferson* (New York, 1937), attempts the second. An extremely useful diagram setting

forth "Financial Irrigation of the United States by Funds appropriated for Emergency Use under the New Deal" was published in connection with an unsigned article on *The Federal Budget* — quoted pp. 462 and 464 twice — in the magazine *Fortune* (New York) for December 1934. For alternatives, within the framework of the libertarian state, to the "New Deal" attempted in the U.S.A., see CHILD, M. W., *Sweden: The Middle Way* (149) for a description of achievements in Sweden, and

396. MACMILLAN, H., *The Middle Way* (London, 1938) for a discussion of possibilities in Great Britain.

New Deal controversies have also focused renewed attention upon the Supreme Court of the United States in the constitutional system. For background there is the standard work of

397. WARREN, C., *The Supreme Court in United States History* (revised edn., 2 vols., Boston, 1926) and  
 398. HAINES, C. G., *The American Doctrine of Judicial Supremacy* (2nd. edn., revised, Berkeley, 1932). Specially relevant to recent controversies are :  
 399. PINTO, R., *Les juges qui ne gouvernent pas* ("Opinions dissidentes à la Cour Suprême des États Unis, 1900-1933", Paris, 1934), with which may be compared  
 400. LIEF, A., *The Dissenting Opinions of Mr. Justice Holmes* (New York, 1929),  
 401. CORWIN, E. S., *The Twilight of the Supreme Court* (New Haven, 1935) and  
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